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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Claudia Wilken, Judge

IN RE: COLLEGE ATHLETE NIL )  
LITIGATION. )  
 ) NO. 20-03919 CW  
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 )

Oakland, California  
Thursday, September 5, 2024

**TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS**

**APPEARANCES:** (via videoconference)

For Plaintiffs:

HAGENS BERMAN SOBOL SHAPIRO LLP  
1301 Second Avenue - Suite 2000  
Seattle, Washington 98101  
**BY: STEVE W. BERMAN, ATTORNEY AT LAW**  
**EMILEE SISCO, ATTORNEY AT LAW**  
**STEPHANIE VERDOIA, ATTORNEY AT LAW**

HAGENS BERMAN SOBOL SHAPIRO LLP  
715 Hearst Avenue - Suite 202  
Berkeley, California 94710  
**BY: BENJAMIN J. SIEGEL, ATTORNEY AT LAW**

WINSTON & STRAWN LLP  
200 Park Avenue  
New York, New York 10166  
**BY: JEFFREY L. KESSLER, ATTORNEY AT LAW**  
**DAVID L. GREENSPAN, ATTORNEY AT LAW**  
**ADAM I. DALE, ATTORNEY AT LAW**  
**NEHA VYAS, ATTORNEY AT LAW**

**(APPEARANCES CONTINUED ON THE FOLLOWING PAGE)**

Remotely Reported: Marla F. Knox, CSR No. 14421, RMR, CRR  
United States Official Reporter

**APPEARANCES:** (continued, via videoconference)

For Plaintiffs:

WINSTON & STRAWN LLP  
101 California Street - 35th Floor  
San Francisco, California 94111

**BY: JEANIFER E. PARSIGIAN, ATTORNEY AT LAW**

For Defendants NCAA and Power Five Conferences:

WILKINSON STEKLOFF LLP  
2001 M Street, NW - 10th Floor  
Washington, D.C. 20036

**BY: RAKESH KILARU, ATTORNEY AT LAW  
CALANTHE ARAT, ATTORNEY AT LAW**

For Atlantic Coast Conference:

LATHAM & WATKINS LLP  
505 Montgomery Street - Suite 2000  
San Francisco, California 94111

**BY: CHRISTOPHER S. YATES, ATTORNEY AT LAW**

For The Big Ten Conference, Inc.:

MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, Illinois 60606

**BY: BRITT M. MILLER, ATTORNEY AT LAW**

For The Big 12 Conference, Inc.:

SIDLEY AUSTIN LLP  
2021 McKinney Avenue - Suite 2000  
Dallas, Texas 75201

**BY: NATALI WYSON, ATTORNEY AT LAW  
ANGELA C. ZAMBRANO, ATTORNEY AT LAW**

For Alex Fontenot:

KOREIN TILLERY LLC  
505 North 7th Street - Suite 3600  
St. Louis, Missouri 63101

**BY: GARRETT R. BROSHUIS, ATTORNEY AT LAW**

KOREIN TILLERY LLC  
205 N. Michigan Plaza - Suite 1950  
Chicago, Illinois 60601

**BY: GEORGE A. ZELCS, ATTORNEY AT LAW**

**(APPEARANCES CONTINUED ON THE FOLLOWING PAGE)**

**APPEARANCES:** (continued, via videoconference)

For Alex Fontenot:

OLSON GRIMSLEY KAWANABE HINCHCLIFF &  
MURRAY LLC

700 17th Street - Suite 1600

Denver, Colorado 80202

**BY: SEAN C. GRIMSLEY, ATTORNEY AT LAW**

For Pac-12 Conference:

COOLEY LLP

3 Embarcadero Center - 20th Floor

San Francisco, California 94111

**BY: WHITTY SOMVICHIAN, ATTORNEY AT LAW**

For Grace E. Menke:

MOLO LAMKEN LLP

430 Park Avenue

New York, New York 10022

**BY: STEVE F. MOLO, ATTORNEY AT LAW**

**ALEXANDRA C. EYNON, ATTORNEY AT LAW**

**CATHERINE MARTINEZ, ATTORNEY AT LAW**

**SWARA SARAIYA, ATTORNEY AT LAW**

**SARA TOFIGHBAKHS, ATTORNEY AT LAW**

MOLO LAMKEN LLP

600 New Hampshire Avenue, N.W.

Washington, D.C. 20037

**BY: LOIS AHN, ATTORNEY AT LAW**

MOLO LAMKEN LLP

300 North LaSalle Street - Suite 5350

Chicago, Illinois 60654

**BY: ERIC POSNER, ATTORNEY AT LAW**

**ELIZABETH K. CLARKE, ATTORNEY AT LAW**

CONRAD METLITZKY KANE LLP

217 Leidesdorff Street

San Francisco, California 94111

**BY: WILLIAM J. COOPER, ATTORNEY AT LAW**

For Southeastern Conference:

ROBINSON BRADSHAW HINSON, P.A.

101 North Tryon Street - Suite 1900

Charlotte, North Carolina 28246

**BY: ROBERT W. FULLER, III, ATTORNEY AT LAW**

(APPEARANCES CONTINUED ON THE FOLLOWING PAGE)

1 **APPEARANCES:** (continued, via videoconference)

2 For Southeastern Conference:

3 WHEELER TRIGG O'DONNELL LLP  
370 17th Street - Suite 4500  
4 Denver, Colorado 80202

4 **BY: KATHRYN REILLY, ATTORNEY AT LAW**

5 For Amici Curiae:

6 THE VOLANTE LAW FIRM LLC  
7029 Longview Drive  
7 Solon, Ohio 44139

7 **BY: RICHARD J. VOLANTE, ATTORNEY AT LAW**  
8 **DAVID M. WEST, ATTORNEY AT LAW**

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Thursday - September 5, 2024

2:30 p.m.

P R O C E E D I N G S

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**THE CLERK:** So, appearing for Plaintiffs presenting argument is Steve Berman and Jeffrey Kessler.

Also appearing would be David Greenspan, Jennifer Parsigian, Adam Dale, Neha Vyas, Benjamin Siegel, Emilee Sisco and Stephanie Verdoia.

Defense Counsel for NCAA is Rakesh Kilaru. Also appearing is Calanthe Arat.

Defense Counsel for ACC is Chris Yates.

Defense Counsel for Big Ten is Britt Miller.

Defense Counsel for Big 12 is Natali Wyson and Angela Zambrano.

Defense Counsel for Pac-12 is Whitty Somvichian.

Defense Counsel for SEC is Robert Fuller and Katie Reilly.

(Pause in proceedings.)

**THE CLERK:** The Menke women objectors' Counsel appearing -- making an appearance or speaking is Steven Molo.

Also appearing is Eric Posner, Elizabeth Clarke, William Cooper, Alexandra Eynon, Catherine Martinez, Swara Saraiya, Sara -- I'm not going to try it -- T-O-F-I-G-H-B-A-K-H-S-H -- and Lois Ahn.

And for the Colorado objectors oh, Mr. -- I have already forgotten --

1           **MR. BROSHUIS:** It's okay.

2           **THE CLERK:** And also appearing with Mr. Garrett  
3 Broshuis is Sean Grimsley and George Zelcs.

4           Amicus Curiae Counsel is Richard Volante and David West.

5                               (Pause in proceedings.)

6           **THE CLERK:** The Court is now in session. The  
7 Honorable Claudia Wilken is presiding.

8           Calling civil case numbers 20-3919, In Re: College Athlete  
9 NIL Litigation and civil case number 23-1593, Hubbard versus  
10 National Collegiate Athletic Association.

11           Counsel and all parties listening in, this proceeding is  
12 being reported. Any other recording of this proceeding either  
13 by video, audio, including screenshots or other copying of the  
14 hearing is strictly prohibited.

15           Also, any counsel that is not currently speaking to the  
16 Court, please mute your microphones.

17           Thank you.

18                               (Pause in proceedings.)

19           **THE COURT:** Good afternoon, everybody. We have a lot  
20 to cover and a lot of people who want to talk.

21           So, I -- I think what I will do is start with some notice  
22 and claim form kind of picayunish issues and then move onto the  
23 more substantive issues and start by asking some of the many  
24 questions that I have for some of you.

25           And then at some point I will ask if anybody really has

1 something to add that hasn't been discussed, and I will try to  
2 give everyone some time to do that; but I'm most interested in  
3 getting the answers to the questions that I have after reading  
4 all your briefs and the declarations and the expert and the  
5 cases and all of that.

6 So, with respect to the notice, I have some issues with  
7 the notice in the claim form; and I don't quite know how to  
8 deal with them.

9 I don't know if I can conveniently edit them or if I need  
10 to tell you what they all are or what exactly to do, but I'm  
11 just -- I will give you some ideas of some things that I would  
12 like to have changed, and then we can talk later maybe about  
13 how best to go about doing it.

14 One thing I always like to put in my notice is since this  
15 happened to me once was a final hearing date had to be changed,  
16 and the notice had said "it will be on such and such a date;"  
17 and it was a big hassle trying to get everybody to change the  
18 date.

19 So, any place where it says anything about the final  
20 hearing date, it should say "subject to change." There is one  
21 place where it does do that, but I would like it to be every  
22 place.

23 **THE CLERK:** Your Honor, I'm so sorry to interrupt. I  
24 do need to start the recording.

25 **THE COURT:** Oh, okay.

1           **THE CLERK:** I'm so sorry.

2           **THE COURT:** No problem.

3           **THE CLERK:** Okay, thank you.

4           **THE COURT:** Sure. We have our court reporter. And,  
5 by the way, in addition to it being forbidden to record any --  
6 privately any of the video or audio, it's also the case that  
7 the official record of the proceeding is the court reporter's  
8 transcript and although there might be a recording made by the  
9 Zoom program or application, that -- neither that nor any  
10 unauthorized recordings that anybody else might want to make  
11 are not the official record of the case.

12           So, the continuance, I would like it to be clear to  
13 everybody that in order to object, they need to make a written  
14 objection. And in order to speak -- and I don't like to use  
15 the word "appear" because that -- some people think -- lay  
16 people might think that "appear" means just be there; but they  
17 can object but they must object in writing.

18           They can ask to speak, but I don't know how many people  
19 are going to want to speak. So, it may be the case that not  
20 everybody who wants to speak will be allowed.

21           So, they need to be told that they may be allowed to speak  
22 if they file a written objection and ask to speak.

23           **MR. BERMAN:** May I ask a question on that, Your Honor?

24           **THE COURT:** Yeah.

25           **MR. BERMAN:** Steve Berman. Because we are already



1 getting questions about this.

2 In the event that you gave preliminary approval is the  
3 final hearing going to be a video or in person?

4 **THE COURT:** What I'm thinking of doing -- and I have  
5 been checking around for this because I haven't done it  
6 before -- is what we call a hybrid proceeding in which I would  
7 be in court; the lawyers who are speaking would be in court,  
8 but we would also have availability of remote access so that  
9 others -- I'm just anticipating that, perhaps, there might be  
10 more people wanting to attend than we can fit in our courtroom.

11 So, my idea would be to have some people in person and  
12 then have remote access so that more people would have access  
13 to it.

14 I would give out certain number of seats to each party.  
15 You know, you can have four seats; and you can have four seats.  
16 The press can have X number of seats. Maybe we will have an  
17 overflow courtroom where there will be a monitor that will have  
18 a Zoom panelist application running.

19 And then other people could either be elsewhere in the  
20 courthouse or they can be at Starbucks across the street or  
21 whatever. That's what I have in mind, but let's wait and see  
22 how it looks.

23 Okay. So, I do think that the class definitions, very  
24 simple ones, but just a line of what the classes are should be  
25 in the notice because the FRCP says so.

1 I think there should be some explanation about the  
2 damages; just a line, like, what you mean by lost  
3 opportunities -- well, lost NIL opportunities and what's that.

4 I don't want to make this thing any longer than it has to  
5 be, but I do think we should say something that a layperson  
6 would grasp as to what the forms of damages are.

7 We have things like "you were denied compensation  
8 opportunities." Well, it's not -- I mean, that sort of makes  
9 it -- you sound like you went to your athletic director and  
10 said, "Can you please pay me a salary?" And she said no.  
11 That's not how it works, of course.

12 So, the persons -- people aren't actually denied  
13 opportunities. There is -- it's just understood by everyone  
14 that there is no -- and I'm going to call it "pay-for-play"  
15 because it is easier -- that there is no pay-for-play.

16 The distribution plan, I think, should have a little  
17 something in it -- in the notice about how that's going to  
18 work, and I also think -- this is out of order -- but I also  
19 think the distribution plan or I'm wondering whether the  
20 distribution plan ought not to be in the settlement agreement.

21 So why don't you-all give that some thought. Again, I  
22 don't want to drag everything out and make it a lot longer than  
23 it needs to be, but there is nothing that explains how this  
24 money will be distributed just logistically.

25 Are there checks? I saw a mention of Venmo. It's going

1 to be every year for ten years. How is -- who is going to keep  
2 track of that and how are they going to do it?

3 We can't address everything, but I feel like there should  
4 be some explanation of how this money is going to be  
5 distributed.

6 This is Hubbard -- and we will talk more about Hubbard  
7 later -- but I have a problem with the Hubbard claim form.

8 It has these four criteria, and you are supposed to fill  
9 in a little box whether you were eligible, whether you were --  
10 I don't know what they are. There's four things there -- but  
11 they aren't meaningful, at least the way you have got it fixed  
12 up now.

13 The criteria for getting an academic achievement award  
14 under this rubric is to -- that your school was giving out  
15 those awards. Your school had certain criteria and you met the  
16 criteria.

17 So, to ask those four things about eligibility and  
18 academic standing or whatever they are, may or may not be what  
19 your school wanted nor is there any place for you to explain  
20 how it is that you qualified.

21 And then in the sort of catchall provision at the bottom  
22 where it says, "Well, do you think you ought to get paid anyway  
23 even though you don't qualify? If so, say why," and there is  
24 no explanation for how a person might possibly qualify for that  
25 because you are a nice person? Because you are financially

1     needy?

2             What are -- are there criteria and what are they so they  
3     know what to write down if they want to be considered for that.

4             Okay. So remind me to get back to this and tell me at the  
5     end how you think it would be best; if you want to take another  
6     shot at these notices and claim forms or if you want me to try  
7     to do it and give it to you and see what you think.

8             There is also some inaccuracies. There is one place in  
9     the house claim form -- it's the last page, shaded area --  
10    where one place it says the start date is 2019 but it is really  
11    2016. So somebody needs to go through it with a fine tooth  
12    comb and make sure it's all -- there is no inaccuracies.

13            I know that you did this under short notice and it was  
14    very high pressure, and there is bound to be errors. And I'm  
15    not being judgmental, but we need to check them and make sure  
16    they are all correct.

17                   (Pause in the proceedings.)

18            **THE COURT:** Okay. So, we had our litigation classes  
19    and three damage classes were certified; one injunctive relief  
20    class was certified. There was a motion to certify in Hubbard,  
21    but it wasn't ruled on because the settlement was in progress.

22            I -- if you could tell me briefly -- I guess, it might be  
23    Mr. Berman who addressed this -- what the difference is between  
24    the certified classes and the litigation classes. And to the  
25    extent there are differences, why are they?

1 I know that one is the certified class -- the settlement  
2 classes add the scholarship limit claim and the pay-for-play  
3 claim; but as far as either other claims or -- and/or the start  
4 and stop dates and/or who is in it -- is it just P5 or is it  
5 all of D1 -- are those factors different as between the  
6 litigation certified classes and the settlement classes?

7 Can anyone do that off the top of their head briefly and  
8 efficiently?

9 **MR. BERMAN:** Jeff, do you have that off the top of  
10 your head?

11 **THE COURT:** If not, you can write it up later.

12 **MR. BROSHUIS:** Your Honor, I can explain a little from  
13 my point of view if you'd like me to.

14 **MR. KILARU:** Your Honor, I can also explain from the  
15 point of view of the parties, and Mr. Berman and Kessler can  
16 correct me if I get anything wrong.

17 I believe -- and, again, they can correct me if I get any  
18 of this wrong -- as far as the damages classes, I don't believe  
19 that the house football and basketball players class, I think,  
20 is largely, as you certified it, except it now folds in the  
21 additional claims as you mentioned for pay-for-play.

22 The same is true of the women's basketball class.

23 The lost NIL opportunities class, what I think is what --  
24 I think you called it that, has now been broadened in the house  
25 to encompass claims for all of Division I.

1 And then the pay-for-play -- the additional sports class  
2 similarly encompasses all of Division I and all athletes who  
3 were not in Power Five basketball and football.

4 Is that about, right, Mr. Berman and Kessler? I think  
5 that's the general summary.

6 **MR. KESSLER:** That is essentially correct. The other  
7 change is we have a cut-off date order for the damages classes  
8 of September 15th, 2024.

9 When you did the certified classes, it was a cut-off date  
10 for those litigated classes because there was a -- you know, a  
11 different period at that time.

12 Now, that we know the end date, we put in that end date;  
13 but other than that, it is essentially the changes that were  
14 described by Mr. Rakesh.

15 **THE COURT:** Okay. So, football -- class 1 football  
16 class and class 2 women's basketball class are still only P5?  
17 They weren't expanded to D-I?

18 **MR. KESSLER:** That's correct because we dealt with the  
19 D-I issues in the other classes. These classes are essentially  
20 the same except for the cut-off date and adding new claims like  
21 the pay-for-play claims.

22 **THE COURT:** Okay. Well, why was the other sports and  
23 the injunctive relief, why were those expanded to D-I and not  
24 just P5?

25 **MR. KESSLER:** Well, because we -- the second amended

1 complaint -- our original complaint did not assert claims for  
2 all of D-I with respect to the first two classes at all; okay.

3 In the second amended complaint, we assert pay-for-play  
4 claims on behalf of all of D-I.

5 We always had all of D-I in the injunctive class. That  
6 has never changed.

7 **THE COURT:** Okay. Then it's just the other classes  
8 that has changed, other sports. Why has that changed?

9 **MR. KESSLER:** Because we amended the second amended  
10 complaint to add --

11 **THE COURT:** Right, I know it is consistent with the  
12 second amended complaint; but I want to know why --

13 **MR. KESSLER:** We added in --

14 **THE COURT:** -- the complaint then, if that's the  
15 reason.

16 **MR. KESSLER:** Yes. We added in claims for damages for  
17 the pay-for-play claims for all of D-I as well as -- so it  
18 covered the existing P5 class members, we had to expand it  
19 to --

20 **THE COURT:** Okay.

21 **MR. KESSLER:** -- the other ones.

22 **THE COURT:** Okay. So -- and then as Mr. Berman points  
23 out, there is a different difference in the end date.

24 One ends on September 15, 2024; and the earlier one ended  
25 in something that I don't understand -- hopefully you will be

1 able to tell me -- when people were initially eligible to  
2 compete.

3 What does it mean to be initially eligible to compete? Do  
4 you get a letter, a piece of paper? What do you get? How do  
5 you know you are initially eligible to compete? And how long  
6 before you actually start playing games does that happen to  
7 you?

8 **MR. KESSLER:** So, because of that uncertainty is why  
9 we put in September 15th as an end date. In other words, what  
10 that means -- what that means is that if by September 15th they  
11 have joined a team and are eligible to complete on that team,  
12 that they are in on that date.

13 We are essentially trying to identify the student athletes  
14 who have joined the team, the NCAA certifies eligibility of  
15 each member of the team. And so, they have been joined and  
16 certified by that date.

17 **THE COURT:** Well, okay.

18 **MR. KILARU:** Your Honor, if I might just briefly add  
19 on that, Mr. Kessler is right that the NCAA does this; and it's  
20 a known quantity in a defined group of individuals because you  
21 do get a document of certification and there is a record of  
22 certification.

23 **THE COURT:** Is there a defined date that says "this is  
24 the date upon which you were certified" --

25 **MR. KILARU:** Yes.



1           **THE COURT:** -- "as initially eligible to compete?"

2       There is a date certain because --

3           **MR. KILARU:** Yes.

4           **THE COURT:** -- if it is going to be a date potentially  
5       of a class, it needs to be a date certain and not something  
6       amorphous.

7           **MR. KILARU:** I apologize, Your Honor. For each  
8       student there is a defined date, so students will know.

9           **THE COURT:** Then what's the magic number of  
10      September 15, 2024? Is there a reason for that number being  
11      changed too, instead of the other one?

12          **MR. KESSLER:** So, the --

13          **MR. KILARU:** Your Honor, I believe the earlier one was  
14      tied to the date of class certification, so it wouldn't extend  
15      forward in time. So, we thought this was a reasonable way to  
16      have an end to the date and --

17          **THE COURT:** So, it was just built in as a date because  
18      you needed a date to end things, which is fine. I'm not  
19      criticizing. I'm just wondering.

20          **MR. KILARU:** I would say in part but it also has the  
21      effect of applying to many student athletes in the '24-'25 year  
22      because many of these decisions are made in the fall of 2024  
23      before students come to campus, enroll or begin playing their  
24      sport.

25          **MR. KESSLER:** Right. The goal, Your Honor, is when we

1 did the negotiation for the damages, for example, we were  
2 including the damages that would occur in the start of the  
3 '24-'25 academic year.

4 So, we needed to advance the date from the class  
5 certification date of the litigated classes to now include  
6 athletes who would start or be eligible by September 15th so  
7 that their claims were included, and they will get damages  
8 attributable to that year in the allocation formula.

9 **THE COURT:** Okay. Here is a random question that's  
10 unconnected to anything else.

11 I'm looking for -- I know the date when the NCAA suspended  
12 its third party NIL rules. And my question is -- that was July  
13 of 2021. My question is: Did that also suspend the  
14 prohibition on video game participation? Or does anybody know  
15 or does anybody care?

16 **MR. KESSLER:** The same rules, Your Honor. The video  
17 game participation was that you couldn't sell your NIL rights  
18 for a video game. So, there is no difference between those  
19 NIL. It's the same.

20 **THE COURT:** Okay, thank you. Excuse me. I need to  
21 read my notes for a second.

22 (Pause in proceedings.)

23 **THE COURT:** Oh, when you are thinking about fixing the  
24 notice form, if you look at the press release, the press  
25 release actually -- I'm sorry to say -- does a slightly better

1 way of describing briefly and simply what the damages, what the  
2 class, what the distribution are.

3 So, if you are trying to write something better than  
4 "denied opportunities for compensation" or "lost  
5 opportunities," you might take a look at how it is phrased in  
6 the press releases.

7 **MR. BERMAN:** I think what we will do, Your Honor, is  
8 we will take a first stab at it.

9 **THE COURT:** Okay.

10 **MR. BERMAN:** We will send you the Word documents  
11 and -- in case you want to refine what we do.

12 **THE COURT:** Okay.

13 (Pause in proceedings.)

14 **THE COURT:** Oh, and then it always needs to say -- we  
15 don't want to mislead anybody. There is places where it sort  
16 of implies that you will get money. And everywhere anything  
17 like that is said it needs to say "you may get money" because  
18 nobody knows who will get money.

19 And many of the things are only -- are "if your school  
20 chooses to offer them." So, it's not like everybody gets more  
21 scholarships and everybody gets pay-for-play. No. Their  
22 school has to offer them, and they need to understand it should  
23 be -- and that should be clear to them as well as the ten-year  
24 thing. It should always say that this will be paid out over  
25 ten years because that's a substantial difference. Money now

1 versus money over a ten- year period is just a different number  
2 and they need to know that and to know that attorneys' fees and  
3 other costs will come out of it.

4 So, I just want at every turn for people to have certainly  
5 an optimistic but also a realistic notion of what they are  
6 going to get. Everybody is not going to get a million dollars.

7 (Pause in proceedings.)

8 **MR. BERMAN:** No, but we were trying to -- can I speak  
9 to that real briefly, Your Honor?

10 **THE COURT:** Well, just -- yeah, I guess, go ahead.

11 **MR. BERMAN:** There are some people we want to say you  
12 will get paid. So, if you are on a roster and you are getting  
13 house broadcast NIL damages, you will get paid. We are mailing  
14 checks. So we wanted people to know that.

15 **THE COURT:** Okay. Well, maybe you can make a  
16 distinction then. This would be the non-claim form people.  
17 So, you could say they will get a check automatically, and the  
18 claim form people may get a check; and it may depend on whether  
19 their school is offering.

20 (Pause in proceedings.)

21 **THE COURT:** Let's see, okay. So, let's turn to the  
22 more substantive issues starting with the scholarship limits  
23 claim.

24 I'm concerned about the argument by either some of the  
25 objectors that there is no class representative who is making a

1 claim for a lost scholarship.

2 Plaintiff responds by saying that Mya Harrison never got a  
3 scholarship and that Grant House got a partial scholarship.  
4 However, those things are not in the complaint.

5 So, my question is: Do we need such a class rep? If we  
6 do, do we have one? If we do, can we amend the complaint?

7 And this is one reason I haven't actually filed the second  
8 amended complaint yet. Could we add -- if we need someone  
9 else, add someone else in a third amended complaint? So, if  
10 somebody can address that and then whoever else can respond.

11 **MR. BERMAN:** We can do it one of two ways, Your Honor.

12 **MR. KESSLER:** Your Honor -- go ahead.

13 **THE COURT:** Let's start with Mr. Berman. Go ahead.

14 **MR. BERMAN:** We can do it one of two ways. We could  
15 put that information in the complaint. I was wondering why you  
16 hadn't entered that stipulation.

17 Or we could file a declaration from those class  
18 representatives attesting to the fact that they either had a  
19 partial scholarship or no scholarship.

20 **THE COURT:** Well, if you can and don't mind, I think  
21 the cleanest way would be to amend the complaint.

22 **MR. BERMAN:** No problem. We will do it.

23 **THE COURT:** Does anybody have a problem with that?

24 **MR. BROSHUIS:** Your Honor, if I can just speak to that  
25 for a moment, I don't know that that would even -- that would

1 still cure the problem.

2 And the reason is that our case is beyond -- on behalf of  
3 people who are injured by partial scholarship rules. And the  
4 class is defined by those who got partial scholarships.

5 If they are saying that Ms. Harrison did not receive a  
6 scholarship at all, she would not be in our class. And I don't  
7 know that she would have standing even with the amendment.

8 **THE COURT:** What about Grant House?

9 **MR. BROSHUIS:** And with Mr. House they are saying that  
10 he received a partial scholarship but then received the rest of  
11 his scholarship through academic scholarship then.

12 And so, I still don't know that he suffered an injury then  
13 because they are saying he received a full scholarship.

14 **THE COURT:** Okay. Well, if you are worried about it,  
15 Mr. Berman, maybe another thought would be to find another  
16 Plaintiff to add who did not get a scholarship and one who got  
17 a partial scholarship.

18 **MR. BERMAN:** I will take that into account,  
19 Your Honor.

20 **THE COURT:** Okay. Let's see.

21 (Pause in proceedings.)

22 **THE COURT:** Or you could just not add that claim. I  
23 don't suppose that's appealing, but that would be another way  
24 around it.

25 (Pause in proceedings.)

1           **MR. BROSHUIS:** Which is what we would prefer  
2 obviously, Your Honor.

3           **MR. KILARU:** That would be a problem for us,  
4 Your Honor.

5           **THE COURT:** Okay. The problem -- as long as we are on  
6 the scholarships, there's that sort of technical problem with  
7 the Plaintiffs; but in addition to that, there are complaints  
8 that the full scholarships or the partial -- or even the  
9 partial scholarships are not being compensated adequately.

10           So, if I could get somebody on the Plaintiffs' side to  
11 explain or maybe this would be a good job for -- I'm sorry, I  
12 have forgotten how to pronounce it again already -- Kilararoo  
13 (phonetic) or Kilaru?

14           **MR. KILARU:** Kilaru. Thanks, Your Honor.

15           **THE COURT:** Maybe you would be the one to say why it  
16 is that the -- apart from the issue of class representation,  
17 the scholarship limit or partial scholarship availability is --  
18 is not a valuable claim or not a lot more valuable than what is  
19 reflected in the proposed settlement.

20           **MR. KILARU:** Sure, I'm happy to do that, Your Honor.

21           We think that the settlement does provide consideration  
22 for those claims and that the additional compensation claim  
23 settlement amount, the \$600 million, includes scholarship  
24 claims.

25           The history on those claims is quite clear. They have

1 failed every single time they have been litigated.

2 They failed at the motion to dismiss in the *Agnew* case.  
3 They failed at the class certification stage in the walk-on  
4 case and the *Rock* case. And there is really no reason to think  
5 that the claims would be any different here.

6 In fact, the claims are even weaker in this sense because  
7 they are brought whether in this case or the Colorado case on  
8 behalf of all Division I athletes as opposed to the narrower  
9 group of football players in the walk-on case.

10 So, we have even more of the conflicts and impossibilities  
11 of predicting in this context than you did there.

12 So, we don't think that these claims had -- we think that  
13 these claims would have failed on the merits. But, as I think  
14 the Plaintiffs have pointed out in their briefs, there is some  
15 consideration being provided for these claims because they are  
16 just part of the additional compensation that would have been  
17 received in the but-for world that they alleged.

18 **THE COURT:** Okay. Mr. Broshuis, do you want to  
19 respond to that?

20 **MR. BROSHUIS:** Yes, and I would like to respond both  
21 in the matter of substance and the matter of process.

22 For a matter of substance, we fundamentally disagree with  
23 what Mr. Kilaru just said because these are viable claims.

24 These claims have never been litigated. When we are  
25 talking about the walk-on case, the *Agnew* case, we are talking



1 about walk-on football players.

2 Football player cases are different than partial  
3 scholarship cases, and they are also litigated -- in some  
4 instances the walk-on football player case was litigated 20  
5 years ago, and things have obviously changed then from a  
6 litigation standpoint, an NCAA liability standpoint since then.

7 And, you know, it is not that -- two of these cases, they  
8 didn't fail on the merits. They didn't fail at the motion to  
9 dismiss stage. It's that class certification was not granted.

10 In fact, Your Honor distinguished those cases on class  
11 certification; and they have been criticized by other cases as  
12 well.

13 So, we do think that they are strong cases on class  
14 certification. We have evaluated these cases for years. It is  
15 not like we just threw these together.

16 These personally affected me. I'm a former All American  
17 baseball player who was on a partial scholarship. This is a  
18 problem that is rampant in baseball and that every head  
19 baseball coach out there complains about and has complained  
20 about for a number of years.

21 And, in fact, the Movants said in their opening brief that  
22 these had astronomical value when it comes to the injunctive  
23 relief portion of the case.

24 But they didn't even try to value the claims when it came  
25 from a damages standpoint. They say that they are baked into

1 the \$600 million; but it's very telling, Your Honor, that  
2 Dr. Rascher's declarations, neither of them mention these  
3 claims because he, in fact, did not do these calculations; and  
4 he wouldn't do them in the fashion that they are suggesting.

5 No economist would do them in this fashion. This is just  
6 a post hoc argumentation provided by attorneys whenever they  
7 weren't actually valued at all.

8 On an individual -- just on an individual level, you know,  
9 we had an economist provide preliminary estimates of this and  
10 said it is over \$300 million.

11 Look at it just on an individual level. Mr. Cornelio was  
12 the number one recruit coming out of the State of Colorado in  
13 baseball.

14 **THE COURT:** No, we don't have time for that. Just  
15 tell me your legal views and then we will move on.

16 **MR. BROSHUIS:** I'm explaining why they are valuable  
17 because he provided -- he was provided a portion of a  
18 scholarship. And so, he ended up paying to work at TCU and it  
19 results in probably a six-figure claim for him.

20 Now, he is -- and there is a lot of other people who have  
21 six-figure claims for these partial scholarship claims; and  
22 most of these people are only going to get 50 to a hundred  
23 dollars in total out of this settlement.

24 **THE COURT:** Okay. You also wanted to talk about --

25 **MR. BROSHUIS:** That's if --

1           **THE COURT:** Excuse me. You said you also wanted to  
2 talk about the procedural issues. You can have a couple more  
3 minutes to add that, and then I will turn to one of the  
4 Plaintiffs' attorneys if they have any reply. Go ahead.

5           **MR. BROSHUIS:** Thank you, Your Honor.

6           So, as a matter of process, these claims were not  
7 litigated in this case. They are fundamentally different from  
8 what was being litigated in this case, and the cases -- and  
9 other cases confirm that when counsel had no interest in  
10 litigating these cases --

11           **THE COURT:** No. I thought you were going to talk  
12 about adding a new class rep or --

13           **MR. BROSHUIS:** Well, I'm talking about the fundamental  
14 problem of lack of --

15           **THE COURT:** It doesn't help you to interrupt me  
16 because the person who is speaking has a little green box, and  
17 I won't hear what you say if I have my little green box.

18           So, what I thought you meant when you talked about  
19 procedural issues was that you were going to respond on the  
20 issue of a class rep and whether allegations had to be in the  
21 complaint and so on.

22           So, if that's not it, we will move onto Mr. -- one of the  
23 Plaintiffs' attorneys and then move onto another subject.

24           Mr. Berman, Mr. Kessler, does either of you want to add  
25 anything to --

1           **MR. BERMAN:** I would add the following --

2           **THE COURT:** Okay.

3           **MR. BERMAN:** -- these claims, these scholarship  
4 claims, might be good claims for an individual; but they cannot  
5 be certified. I tried it four times; okay. I have lost it  
6 four times. And here is the simple reason, which we evaluated,  
7 you cannot redo who would have gotten a scholarship.

8           Let's say that Berkeley had eight rowing scholarships  
9 instead of four. How would you decide who would have gotten  
10 the other four? It could have been some high schooler who  
11 didn't go to Berkeley because there were no scholarships. It  
12 could have been someone at Berkeley who, "Oh, if I had known I  
13 could have got a scholarship for rowing, I would have been on  
14 the rowing team." You can't certify it.

15           So, any individual who wants to bring a claim can bring  
16 the claim. So we value the claim at basically nothing on a  
17 class basis; right. And counsel valued it at nothing.

18           Those claims have been out there for ten years. If there  
19 was a \$300 million case sitting out there, I guarantee you the  
20 Plaintiffs' antitrust bar would not have let it sit out there.

21           And all of the sudden we settle it, the next day he files  
22 it. That speaks volumes to the value of that claim and the  
23 class basis.

24           **THE COURT:** Okay. So, I don't know where this fits  
25 in, in any sort of logical order; but I -- while we have got

1 Mr. Broshuis here, I wanted to raise one other issue.

2 A number of the objectors besides the Fontenot objectors  
3 had issues about releases of other claims; and those were the  
4 Choh release, the Johnson release, the FLSA release -- the  
5 Federal Labor Standards Act wage and hour type claims -- other  
6 labor claims and Title IX.

7 We got a brief from you, I think -- well, from the  
8 Plaintiffs saying that certain of those were not released; and  
9 then we got some revised notices that said certain of those  
10 were not released; but they haven't all been addressed.

11 And I wondered if you can address all of them. And if you  
12 are looking quizzical, it is the Title IX that wasn't  
13 addressed.

14 If you would tell me whether you can give me -- well,  
15 whether this change of the notice is adequate, whether the  
16 claim in the brief -- and I will say Defendant supported it --  
17 is adequate or whether we should have an addendum to the  
18 settlement agreement that would specifically state all those  
19 things.

20 So, if you could address that for me briefly, I would  
21 appreciate it.

22 **MR. KESSLER:** Plaintiffs or Defendant, Your Honor?  
23 Who should address it, Plaintiff?

24 **THE COURT:** Mr. Kessler or Mr. Berman.

25 **MR. KESSLER:** I will address it, Your Honor.

1           **THE COURT:** That's fine. Between you and Mr. Berman,  
2 I don't know who is on what subject.

3           **MR. KESSLER:** I'm doing releases. So, all of these  
4 issues have been addressed.

5           With respect to Choh and the IME claim, the parties have  
6 agreed (inaudible). Choh Defendants actually withdrew their  
7 objection because --

8           **THE COURT:** I know. That's not what I'm asking. I  
9 saw that, yeah.

10          **MR. KESSLER:** So they agree to that.

11          **THE COURT:** Yeah.

12          **MR. KESSLER:** With respect to the Johnson and any  
13 label --

14          **THE COURT:** Were both mentioned in the notice. But  
15 actually even with them -- even -- I mean, maybe I'm being  
16 overly cautious -- but even with them, I just wonder whether it  
17 wouldn't be safer to have it in the settlement agreement  
18 addendum. But, go ahead.

19          **MR. KESSLER:** Okay. So, we will do whatever  
20 Your Honor wants obviously, but there is no disagreement  
21 between Defendants and Plaintiffs that the Johnson cases and  
22 all the label law claims are not covered by the releases.

23          There is no -- there is no release of future damages  
24 claims because of the way the damages are defined. That's  
25 already in the settlement agreement.

1 In other words, a cut-off with a damages class is final  
2 approval. So there is no release of damages claims for any  
3 conduct after final approval.

4 There is also no members of the damages class after  
5 September 15th if they start as a student in the future. So  
6 there are no release of that. That's already in the settlement  
7 agreement.

8 With respect to Title IX, there is no disagreement about  
9 this and it has to do with the release language. The release  
10 language is of NCAA rules.

11 NCAA rules cannot be a Title IX violation. What could be  
12 a Title IX violation is the decisions by individual schools as  
13 to how or not they pay out future benefits or money so there's  
14 nothing that releases that at all in the agreement at all.

15 There is no release of any individual school conduct for  
16 anything in the current releases or settlement agreement. So,  
17 Title IX is completely preserved.

18 **THE COURT:** Okay. Can you say that in an addendum to  
19 the settlement agreement along with the other things you just  
20 mentioned?

21 **MR. KESSLER:** Again, we will have to get -- Defendants  
22 have to agree too. We are happy to make it an addendum that  
23 way.

24 **THE COURT:** What do you say, Mr. Kilaru?

25 **MR. KILARU:** I'm not sure I agree with it precisely as

1 Mr. Kessler put it. There are release provisions that apply to  
2 individual institutions for the claims that we discussed.

3 But if the question is as relates to future Title IX  
4 liability, that's not something we are releasing through the  
5 settlement.

6 **THE COURT:** Okay. Well, why don't you get together  
7 and see if you can work out some wording that will make the  
8 objectors comfortable and that each of you can agree with. I  
9 don't think there is any substantive dispute here.

10 **MR. KILARU:** We don't either, Your Honor.

11 **THE COURT:** It is just finding the right words and  
12 putting them in the right place.

13 (Pause in proceedings.)

14 **THE COURT:** So, did you want to address that,  
15 Mr. Broshuis?

16 **MR. BROSHUIS:** Your Honor, I don't know that I'm best  
17 positioned to do so since we didn't raise any Title IX issues.  
18 It might be better for Mr. Molo to actually address more of  
19 the --

20 **THE COURT:** Oh, that's right. I'm sorry. I meant  
21 Mr. Molo. Yeah, go ahead. Sorry.

22 **MR. MOLO:** Good afternoon, Judge. I'm Steve Molo and  
23 I'm not a former college All American baseball player. I'm  
24 happy to be here, and I want you to know we come here in good  
25 faith.



1 Our concerns are legitimate concerns that we have  
2 expressed on behalf of our clients, and we are -- all women.  
3 And I want to thank the parties for the work that they have  
4 done and congratulate them and the Court to get to this point.  
5 It is not enough as far as we are concerned.

6 To be clear, we are not raising a specific Title IX claim  
7 here. We are saying that the conduct that the NCAA and the  
8 Defendants engaged in was discriminatory to women and had an  
9 anticompetitive effect, and that's alleged in the second  
10 amended complaint.

11 Specifically, there are allegations of the NIL rules  
12 adversely impacted female athletes more than their male  
13 counterparts. The impact of restraints on female athletes is  
14 farther -- further exacerbated by the NCAA's unequal treatment  
15 of female athletes.

16 So, our concern is that this conduct -- anticompetitive  
17 conduct, which had an overly powerful effect on women, which is  
18 set forth in the complaint, isn't fairly compensated in the  
19 settlement. And we can go through that --

20 **THE COURT:** Evidence as to the reason that it all  
21 turned out that way is because of the revenue producing  
22 aspects, which, I agree, are based on history -- past  
23 discrimination against women; but when you are thinking about  
24 damages for past conduct, all you can give is damages for the  
25 liability and not for other things.

1           **MR. MOLO:** I understand what you are saying, Judge,  
2 but the problem is -- and I have a couple slides I could put up  
3 if that's okay.

4           **THE COURT:** No.

5           **MR. MOLO:** Okay, then I won't. All right. But the  
6 problem is this: The conduct that they engaged in is not  
7 really accounted for -- the recent conduct is not really  
8 accounted for in the expert's analysis.

9           Let me give you a very good concrete example that's set  
10 forth in our brief.

11           **THE COURT:** It has to be an antitrust violation. This  
12 case is an anti --

13           **MR. MOLO:** I'm talking about antitrust violation.

14           **THE COURT:** Okay.

15           **MR. MOLO:** The part --

16           **THE COURT:** Point me to it because I have read your  
17 brief a couple of times.

18           **MR. MOLO:** Okay. The NCAA commissioned a study by a  
19 law firm Kaplan Hecker & Fink, well regarded firm. They  
20 produced a two volume report, which indicated that it was about  
21 gender equity in sports; okay. We cite that in our brief as  
22 well, and I can send the Court copies of it if you wish as well  
23 as the other parties.

24           They clearly found that there was, you know, unequal or  
25 inequitable spending, and they go through this whole series of

1 examples where the NCAA failed to promote -- the  
2 anticompetitive conduct that they engaged in for women was much  
3 more egregious than for men. They failed to promote women's  
4 sports.

5 So, for example, the -- the branding of March Madness --  
6 which we all, you know, are well aware of and is very, very  
7 valuable and has been identified as such -- up until 2022,  
8 women could not use March Madness. They were -- they asked for  
9 the opportunity numerous times, and they were denied that  
10 opportunity. In 2022 they were allowed to do that. The -- to  
11 market under March Madness.

12 This year they went from 4 million viewers in 19 -- I'm  
13 sorry -- in 2021 for their final game to over 18 million this  
14 year. It was the highest ranked game. It outstripped men.

15 But-for that conduct women would have had historically  
16 more revenue, more information that could be used by an expert.

17 And an expert could look at this conduct, look at what's  
18 happened more recently, and conclude that, yes, but-for that  
19 conduct, these people would have earned that much more money --  
20 women would have earned that much more money; and they are  
21 being denied that as a result of the way the settlement is  
22 structured.

23 **THE COURT:** Well, okay. You were worried about FLSA  
24 as well, the wage and hour claims, and maybe about the labor  
25 claims or other claims. Are you satisfied with the carve-out

1 that counsel is going to come up with the rest of those things?

2 **MR. MOLO:** It clearly needs to be in the release and  
3 not just in the notice. So, an addendum to the settlement  
4 agreement is fine; but it has got to be in the release because  
5 the notice isn't a release.

6 **THE COURT:** What do you mean a release?

7 **MR. MOLO:** If they are saying they are carving claims  
8 out, they need to specify that; and they can't just say, "We  
9 didn't mean that" or "it is in the notice and it says that."  
10 They have got to clearly --

11 **THE COURT:** It has to be in the settlement agreement,  
12 so, yeah.

13 **MR. MOLO:** Right.

14 **THE COURT:** Did you want to -- Mr. Kessler or  
15 Mr. Berman, want to respond on the Title IX issue? Maybe it's  
16 not a Title IV issue. Maybe it's a sex discrimination issue.

17 **MR. KESSLER:** Yes, Your Honor. I'm deeply sympathetic  
18 to sex discrimination claims. That's not what our damages  
19 address. That's not what our antitrust claims address. It is  
20 not an antitrust violation to engage in sex discrimination. It  
21 may violate Title IX or some other discrimination law, none of  
22 which are released.

23 And so, if there are damages claims for that, they should  
24 be asserted by someone in some other forum. But, as Your Honor  
25 pointed out, these antitrust claims are based on what

1 compensation athletes would have got based on the revenues they  
2 generated.

3 And, unfortunately, the revenues were mostly generated by  
4 male sports -- maybe because of sex discrimination -- but when  
5 we are looking at past damages for an antitrust case, we have  
6 to follow the money; and that's what our experts did, and I  
7 think that's the only thing we could do.

8 I can't be a social policy advocate and, you know,  
9 rejigger the damages to right a sex discrimination wrong. If  
10 the law does that, they need to bring a claim for that  
11 somewhere else.

12 **MR. BERMAN:** There is another reason -- excuse me,  
13 Your Honor. I drafted those allegations that Mr. Molo was  
14 referring to because my client -- our client, Sedona Prince, is  
15 the one who outed the NCAA during a tournament when they shoved  
16 the female athletes into a closet they turned into a weight  
17 room, and the male athletes had this beautiful weight room and  
18 it went viral. So, we were very attune to the discrimination.

19 And so, I put those allegations in hoping that I might be  
20 able to come up with a claim; but it turns out I can't because  
21 Title IX doesn't apply to the NCAA. It doesn't apply to the  
22 conferences.

23 So, we couldn't do anything about it. We had to focus on  
24 our antitrust claims. Doesn't mean we like it, but that's  
25 just -- that's the law.

1           **THE COURT:** Okay.

2           **MR. MOLO:** May I respond briefly?

3                               (No response.)

4           **MR. MOLO:** May I respond briefly?

5           **THE COURT:** Okay.

6           **MR. MOLO:** Just because something violates Title IX  
7 doesn't mean that it's not anticompetitive conduct that the  
8 NCAA had, just like the rules that had been challenged in this  
9 case.

10           So, the fact that it also may be discriminatory based on  
11 sex doesn't mean that it is anticompetitive conduct and subject  
12 to a remedy. And so, I think that addresses Mr. Berman's  
13 claim.

14           The other thing I want to point out is that there are the  
15 settlements focused on revenue generating sports, football and  
16 basketball, also ignores the fact that the schools literally  
17 could not have the revenue of football and basketball without  
18 these non-revenue generating sports, which are mostly sports  
19 played by women.

20           The NCAA rules require schools to have as many as 16 teams  
21 in order to have a football and basketball team.

22           So, if you are a rower, if you are a swimmer, if you are a  
23 gymnast and you are putting in time for your school, that time  
24 is necessary for there to be revenue in basketball and football  
25 under the NCAA rules. And that's completely ignored here.

1 There is no compensation -- or no analysis done for that.

2 And one other thing Mr. Berman said about the Title IX not  
3 applying to the conferences, I disagree with that. It clearly  
4 applies to the schools. I know there has been Court opinion --

5 **THE COURT:** No, not the schools. What he said was it  
6 doesn't apply to the NCAA or to the conferences. And, as far  
7 as I know, that's correct.

8 **MR. MOLO:** Right, I think as to the NCAA; but I  
9 believe as to the conferences, there is at least some dispute  
10 about that.

11 **THE COURT:** Not that I know of but maybe. Okay.  
12 Let's move on to pay-for-play damages.

13 I don't know if I can get an answer to this, and I suppose  
14 it doesn't really matter and time is running out. I was just  
15 so curious.

16 From the *Fontenot* claim, you had a paragraph that talked  
17 about pay-for-play damages due to the earlier filing, 2020, of  
18 *House* than *Fontenot*, the damages start at 2019; but the other  
19 *House* claims start in 2016.

20 The *Fontenot* claims are undervalued such that Plaintiffs  
21 with and without *Fontenot* claims are treated differently.

22 What do you mean by "with or without *Fontenot* claims?"  
23 Who is with and who is without?

24 **MR. BROSHUIS:** Yeah, Your Honor, so, because *Fontenot*  
25 was not filed until 2023, the statute of limitations only goes

1 back to 2019. Whereas, because *House* was filed in 2020, the  
2 statute of limitations goes back to 2016.

3 So, there are some class members that only have *House*  
4 claims and do not have fair pay claims. And Dr. Rascher --

5 **THE COURT:** Why would that be?

6 **MR. BROSHUIS:** Because of the statute of limitations  
7 purposes. So if you played --

8 **THE COURT:** But there --

9 **MR. BROSHUIS:** If you played from 2014 to 2018 --

10 **THE COURT:** -- more people in it.

11 **MR. BROSHUIS:** Sorry, I didn't quite catch that, Your  
12 Honor.

13 **THE COURT:** *House* was filed earlier. So, the statute  
14 of limitations would mean there would be more people in the  
15 *House* class than there would be in the case that was filed  
16 later. That's what I don't get.

17 **MR. BROSHUIS:** Correct. So some of those members of  
18 *House* do not have fair pay claims.

19 **THE COURT:** Why not?

20 **MR. BROSHUIS:** Let's say, for instance --

21 **THE COURT:** What?

22 **MR. BROSHUIS:** Let's say, for instance, an athlete  
23 played from 2014 to 2018, then because of statute of  
24 limitations purposes, they have *House*, broadcast NIL claims;  
25 but they do not have *Fontenot* claims.



1           **THE COURT:** Because they have graduated and quit  
2 playing.

3           **MR. BROSHUIS:** Correct. So, the statute of  
4 limitations means that their claims have expired.

5           **THE COURT:** I see. I thought you were talking about  
6 claims -- when the claims started, but you are talking about  
7 when they expired.

8           So, you are talking about people with *Fontenot* claims are  
9 people whose claims have not yet expired; and people without  
10 *Fontenot* claims are people whose claims have expired. Is that  
11 the size of it?

12           **MR. BROSHUIS:** People without *Fontenot* claims would,  
13 yes, be those that have broadcast NIL claims, the claims being  
14 litigated here; but their fair pay claims had expired because  
15 there was no fair pay or pay-for-play case on file until 2023.

16           **THE COURT:** Okay.

17           **MR. BROSHUIS:** That's why there are two different  
18 subgroups of people; some with those claims, some without.

19                               (Pause in proceedings.)

20           **THE COURT:** Okay. I guess I don't have much more on  
21 pay-for-play. We have an argument that it's not enough, but  
22 that's the sort of, everybody thinks they can do better getting  
23 more money than the other guy got.

24           So, I'm not -- I don't have any questions about that  
25 claim. I understand it. I do want to talk about the future

1 class members about the injunctive relief claims but...

2 (Pause in proceedings.)

3 **THE COURT:** Let me ask the Plaintiffs: Do you see a  
4 problem with the settlement favoring athletes who played in  
5 higher revenue sports? Is there anything --

6 **MR. KESSLER:** Are we talking about the injunction,  
7 Your Honor, or the damages because they are two different  
8 issues. What is your question about now?

9 **THE COURT:** The damages.

10 **MR. KESSLER:** Okay. So the damages, we don't believe  
11 it favors that. It applies a neutral expert methodology, which  
12 traces what would be paid to these athletes in the competitive  
13 market in the but-for world without the restraints; and the  
14 economists have determined it would be a function of the  
15 revenues that their individual sports generate.

16 So, we don't think it's biased to hire paid athletes. It  
17 applies a neutral formula. And, in fact, we cited this in our  
18 brief; that the Ninth Circuit has indicated you are required as  
19 class counsel when you are doing allocations to have neutral  
20 formulas that may favor some class members over the others  
21 because the neutral formula indicates some suffered more  
22 injury.

23 So, I don't think there is anybody who could look at this  
24 as an economist and not say, for example, that football players  
25 who generate much more money than a rower would get more

1 compensation than a rower in a competitive market.

2 I mean, it's the only neutral economic principle you could  
3 apply in an antitrust case. So, I don't think there is any  
4 problem with it. I think it is required actually for us to be  
5 fair to all the class members.

6 **THE COURT:** Okay, let's talk about the damages case  
7 versus the injunctive relief case, the present class members  
8 versus future class members.

9 Can the Plaintiffs represent future class members? Do the  
10 future class members need representation by a class rep and  
11 also, for that matter, by an unconflicted attorney?

12 **MR. BERMAN:** And the answer to that is under Ninth  
13 Circuit law, no, Your Honor.

14 So, we were very aware of the situation from the get-go.  
15 We understood that some lawyer trying to get into this case  
16 would look at the Second Circuit and claim the Second Circuit  
17 says you have to have separate counsel.

18 The Second Circuit does not say that. The Second Circuit  
19 says you have got to look at the facts and see if there is some  
20 indicia that maybe there was a conflict.

21 And in those two cases -- the *Payment* case and the  
22 *Literary* case -- there was an indicia that counsel had traded  
23 off.

24 **THE COURT:** You are not quite as loud as everybody  
25 else. Can you lean forward or pull your mic closer to you?

1           **MR. BERMAN:** So, in those cases there were indicia of  
2 a tradeoff; okay. So, we went into this case and at the very  
3 first session we told the Defendants and the mediator, "We have  
4 to negotiate the injunction first and we will not talk about  
5 anything else until the injunction is finished." And that's  
6 what happened.

7           **THE COURT:** Okay. I appreciate it, but what I want to  
8 ask is: Is there any authority for the proposition that that  
9 solution solves the problem?

10          **MR. BERMAN:** Yes, the *Volkswagen* case.

11          **THE COURT:** Okay.

12          **MR. BERMAN:** I was in that case. We had people with  
13 claims of different values, and the Ninth Circuit said that's  
14 not a problem.

15          **THE COURT:** Okay. How did you distinguish *Payment*  
16 *Card* and *Ortiz* or even *Literary* from --

17          **MR. BERMAN:** In the Ninth Circuit the Court seemed to  
18 say you have to show a serious conflict. In those two cases --

19          **THE COURT:** Wait. In the Ninth Circuit?

20          **MR. BERMAN:** Yeah.

21          **THE COURT:** Which case are you talking about?

22          **MR. BERMAN:** I will pull it up.

23          **THE COURT:** Is it a Ninth Circuit case -- *Ortiz* and  
24 *Payment Card* and *Literary* are all Second Circuit cases.

25          **MR. BERMAN:** Yes, yes, but I don't think the Ninth

1 Circuit has adopted the *Payment Card* standard.

2 **THE COURT:** Oh, I see what you are saying. Okay.

3 Well --

4 **MR. BERMAN:** Look at --

5 **THE COURT:** -- can you distinguish any of those cases?

6 **MR. BERMAN:** Yes. In those cases there was some  
7 tradeoff where you had one group trading off the strength of  
8 their case at the expense of another group.

9 We have the opposite here. In the injunction case we had  
10 a home-run; okay. If you had said -- if I had said to you at  
11 the beginning of this case, "We are going to get a revenue  
12 sharing model of 50 percent," you would have said you're crazy.

13 And in the room that day when we floated the idea of  
14 revenue sharing -- both for compensation and for NIL, and the  
15 Defendants said that might be a good solution -- I mean, I  
16 think Jeff and I fell off our chairs, literally.

17 I was so surprised that when I got out of my Uber, I left  
18 my luggage on the curb because it was such a shocking  
19 development.

20 So, what more could -- we got a 50 percent revenue share.  
21 That's a home-run. So, there is no indicia of any conflict  
22 with respect to the injunction class.

23 Then you look at the damages class. We hit home-runs  
24 again.

25 **THE COURT:** Well, before you go onto that, tell me

1 about the class rep for the injunctive class, the future class  
2 members, the 6-year-old who is playing kickball on the asphalt.

3 (No response.)

4 **THE COURT:** I'm still green but I stopped talking.

5 **MR. BERMAN:** I'm sorry. So, the six-year-old, okay --

6 **THE COURT:** That was a joke. I just want to know  
7 similar to the scholarship claim, whether we need -- whether we  
8 have -- perhaps in Sedona Prince -- or whether we need or  
9 whether we don't need anyway a class rep for future players.

10 **MR. BERMAN:** Well, Sedona is currently still a  
11 student.

12 **THE COURT:** I know.

13 **MR. BERMAN:** Okay. And so what we contemplate --

14 **THE COURT:** The case is going to last longer than  
15 that.

16 **MR. BERMAN:** That's right, and what we contemplate is  
17 that each year we will add a new class rep.

18 **THE COURT:** What about now?

19 **MR. BERMAN:** Well, now we don't need one.

20 **THE COURT:** Pardon?

21 **MR. BERMAN:** We don't need one now.

22 **THE COURT:** Oh, because of Ms. Prince.

23 **MR. BERMAN:** Ms. Prince, okay, and then the next  
24 season, okay -- the way we envision this is -- and I got this  
25 idea because I was a college athlete -- and you get a --

1           **THE COURT:** What sport?

2           **MR. BERMAN:** Soccer. And you get a notice from the  
3 NCAA in the summer. It's your notice of eligibility. When I  
4 played, it came from Shawnee, Kansas. And you open it up and  
5 you sign your papers and then you are eligible.

6           So, the class notice is going to go into -- going forward  
7 every year an athlete will get that class notice and have the  
8 opportunity -- if they didn't previously have the  
9 opportunity -- to object to the (b)(2) part.

10          For the (b)(3) part, there is no release of that sixth  
11 grader. That sixth grader could bring a lawsuit for class  
12 action damages. There is no bar.

13          **THE COURT:** Oh, they could bring a class action?

14          **MR. BERMAN:** Absolutely, for damages.

15          **THE COURT:** Can they have the attorney of their choice  
16 or do they have to have you?

17          **MR. BERMAN:** No, they don't have -- I might not even  
18 be around then. Who knows. They can --

19          **THE COURT:** They can pick the attorney of their  
20 choice?

21          **MR. BERMAN:** They can do it with the attorney of their  
22 choice.

23          **THE COURT:** Do they have to come to me in the Northern  
24 District of California?

25          **MR. BERMAN:** They do -- I have to look that up. I

1 think they do.

2 **THE COURT:** They do?

3 **MR. BERMAN:** Yes.

4 **MR. KESSLER:** No. Your Honor, if they asserted -- if  
5 they asserted a separate antitrust claim for future conduct,  
6 they could choose their attorney and choose their forum.

7 Now, someone may move to transfer and say if a court is  
8 familiar with these claims, but that's a whole different issue.

9 **THE COURT:** What if it's for damages?

10 **MR. KESSLER:** Damages are not released at all for the  
11 future.

12 **THE COURT:** Right. Can they bring a damage claim with  
13 their own attorney in a court of their choice?

14 **MR. KESSLER:** Yes.

15 **MR. BERMAN:** Yes.

16 **THE COURT:** Yes?

17 **MR. KESSLER:** Yes.

18 **MR. BERMAN:** Yes.

19 **MR. KESSLER:** And, Your Honor, Mya Harrison is another  
20 current athlete in addition to Ms. Prince.

21 So, we have two current representatives with standing. We  
22 have two regarding the future injunction.

23 **THE COURT:** There is something in there -- and now I  
24 can't swear what it is -- but there is something in there that  
25 requires somebody to bring some kind of claim in the Northern



1 District of California. Maybe it's not antitrust damage claim.  
2 Maybe it is an antitrust injunction claim. I don't remember  
3 what it is, but there is something like that in there. And  
4 what is it and is it okay or does anyone else remember?

5 **MR. KILARU:** Your Honor, I believe that --

6 **MR. KESSLER:** Well, I --

7 **MR. KILARU:** If you want to go ahead, Mr. Kessler  
8 that's fine.

9 **MR. KESSLER:** You can go, please.

10 **MR. KILARU:** I believe that what the settlement  
11 agreement says is that if anyone is challenging the settlement  
12 agreement of the injunctive settlement, they have to go to the  
13 Northern District of California, which makes sense because  
14 that's the court that will be presiding over the injunction.

15 I think in the hypothetical scenario that was discussed of  
16 damages claims, I believe that we and the Plaintiffs may move  
17 to transfer the case to the Northern District of California;  
18 but I don't think there is an obligation to file it there.

19 **THE COURT:** What if the person wasn't suing about  
20 the -- your antitrust settlement but was instead saying since  
21 then, NCAA has come up with new antitrust violations and I want  
22 to sue on those that are not the old ones, they are new ones  
23 they just started doing recently? Can they do that?

24 **MR. KILARU:** Yeah. I don't think those claims would  
25 have merit, and you could (inaudible) position; but if that's

1 their claim, they can bring that claim. We would have the  
2 right, of course, to try to transfer that just as you can  
3 always transfer related cases implicating same -- similar  
4 issues.

5 **THE COURT:** Right, okay.

6 **MR. KESSLER:** There is nothing in the agreement that  
7 says such a claim has to be in this court or such a claim has  
8 to be by any particular counsel. It's all just a normal  
9 situation. They are unreleased claims that someone can bring  
10 anywhere they like in the United States, and then it moves from  
11 there.

12 **THE COURT:** Did you have something, Mr. Berman?

13 **MR. BERMAN:** Paragraph 46 that you recall in case you  
14 want to read it again and it relates to someone challenging  
15 compliance with the terms of the injunction.

16 (Pause in proceedings.)

17 **THE COURT:** Okay. Okay. So, Mr. -- let's see,  
18 Mr. Broshuis, did you want to address this future injunction --  
19 future injunctive relief class issue?

20 **MR. BROSHUIS:** Yeah, and I want to go back to the  
21 *Volkswagen* case that Mr. Berman mentioned because it doesn't  
22 actually speak to potential conflicts between injunctive relief  
23 class and damages class. It contains some dicta about  
24 conflicts and stuff, but then the issue there was purchasers of  
25 Volkswagens; and it doesn't speak to injunctive relief.

1           **THE COURT:** To damages, the people who had the old  
2 cars and the people who had the new cars. I know.

3           **MR. BROSHUIS:** So, it doesn't speak to the injunctive  
4 relief versus damages issue. So, we think the Second Circuit  
5 is still instructive on that.

6           **THE COURT:** Then why is this case like those three  
7 cases?

8           **MR. BROSHUIS:** Your Honor, there are a few reasons  
9 that this is like that and one is --

10          **THE COURT:** And what is the case?

11          **MR. BROSHUIS:** Sorry, what was that?

12          **THE COURT:** Point me to the case.

13          **MR. BROSHUIS:** Yes. So, *Ortiz*, for instance, you had  
14 people that had some claims that were before an important  
15 insurance agreement and some that were after an important  
16 insurance agreement; and we think *Ortiz* speaks more to our  
17 *Fontenot* claims because there are some class members that have  
18 *Fontenot* claims for the reasons --

19          **THE COURT:** Can you refresh pay-for-play claims so I  
20 know what they are?

21          **MR. BROSHUIS:** Sure. I don't like pay for play  
22 because --

23          **THE COURT:** Nobody does but it's shorter and it has a  
24 little ring to it.

25          **MR. BROSHUIS:** Can I call them "fair play" instead

1 because that's what I like calling them? But we can call them  
2 pay-for-play.

3 **THE COURT:** Sure.

4 **MR. BROSHUIS:** Some class members have pay-for-play.  
5 Others don't have pay-for-play. And so that's why we think  
6 *Ortiz* really speaks to the *Fontenot* claims.

7 Now, the *Visa* and *Mastercard* case, what you have there is  
8 you had a situation where the same --

9 **THE COURT:** What did you say about *Ortiz*?

10 **MR. BROSHUIS:** So *Ortiz*, what it had to do with is you  
11 had some people who had claims that predated an important  
12 insurance agreement.

13 **THE COURT:** Oh, yeah.

14 **MR. BROSHUIS:** Others that didn't.

15 **THE COURT:** Right.

16 **MR. BROSHUIS:** So, that's why we think that's akin to  
17 the situation that's going on with the pay-for-play claims  
18 because some class members have those claims.

19 **THE COURT:** Well, because some --

20 **MR. BROSHUIS:** What's that?

21 **THE COURT:** Because some of your people's claims have  
22 expired?

23 **MR. BROSHUIS:** Because some people don't have those  
24 claims. You have two subgroups of class members.

25 **THE COURT:** They expired.

1           **MR. BROSHUIS:** Yeah. Some don't have them and some  
2 do, and they weren't being litigated in this case.

3           And so what *Ortiz's* progeny -- and there is a Third  
4 Circuit case called *In Re: Community Bank* that we cited  
5 multiple times that wasn't distinguished on reply.

6           There is also the *Gonzalez* case in the Eastern District of  
7 California that addresses this that they didn't address in  
8 their reply.

9           And both of those cases say that in that type of  
10 situation, when you have claims that weren't being litigated  
11 and there are additional claims being released that only some  
12 class members might have you, should have separate counsel to  
13 represent the people with those claims.

14           Now, their answer to all of that is supposed  
15 compartmentalization, which Mr. Berman said.

16           **THE COURT:** Well, could you go on -- before you say  
17 that -- and tell me why you think this case is like *Payment*  
18 *Card* and *Literary*?

19           **MR. BROSHUIS:** Yeah. And so, *Literary* again I think  
20 is more like *Fontenot* because you are talking about different  
21 people with different damages cases.

22           But when it comes to *Visa/Mastercard* case, what you had  
23 there is a situation where you had the same counsel  
24 representing an important injunctive relief class and also  
25 trying to represent a damages class; and there was a tremendous

1 amount of money at stake for both of those classes.

2 And with that much at stake and when you looked at the  
3 relief at stake at all -- there was evidence of this -- it  
4 turns out that you should have separate representation for both  
5 the injunctive relief class and for the damages class.

6 Now, Mr. Berman says he hit a home-run. I would agree  
7 there are certain aspects of the injunctive relief component  
8 that's good stuff; but there is other stuff like the policing  
9 of NIL collective money that there are a lot of people that  
10 have a problem with.

11 **THE COURT:** We are going to get to that.

12 **MR. BROSHUIS:** Say that again.

13 **THE COURT:** We are going to get to that.

14 **MR. BROSHUIS:** Yeah. So, bottom line, we do think  
15 that there is evidence that there is a problem here; that there  
16 does need to be separate representation.

17 And could I just address the compartmentalization argument  
18 in one minute?

19 **THE COURT:** Okay.

20 **MR. BROSHUIS:** Yeah. So they, say, "Well, our answer  
21 to that is compartmentalization and we did things separately."

22 But if you notice, they didn't support any case law to  
23 support that because there isn't any case law to support that.  
24 That's an entirely novel proposition. And, in fact, we could  
25 not find any cases --

1           **THE COURT:** There are cases where people negotiate  
2 their civil right substantive claims and then only then to be  
3 ethical do they negotiate their attorneys' fee claims.

4           So, it's not entirely a whole cloth. It is done in other  
5 situations.

6           **MR. BROSHUIS:** And I will say this about even that  
7 scenario -- I think this is a little different -- and  
8 especially when it comes to the pay-for-play claims, just  
9 because they say they compartmentalize those, I think we end up  
10 in the same position because there is the danger that if you  
11 are within striking distance of a global settlement -- and you  
12 have agreed to terms on the *House* damages -- I think there is  
13 the danger that, okay, when we are separately negotiating the  
14 pay-for-play damages, there is the damages that we are going to  
15 undersell them.

16           And that's where we think our \$24 billion estimate is  
17 important because it does show that the amount that's actually  
18 being included here is way too low.

19           And going to the attorneys' fee example that you provided,  
20 *In Re: Bluetooth* actually speaks to this. The *In Re:*  
21 *Bluetooth* case says that it's not enough that attorneys' fees  
22 were negotiated separately; that even if you do things  
23 sequentially like that, it could still be problematic.

24           And so, I think the same logic applies outside of that as  
25 well; and I do think this is a major issue.

1           **THE COURT:** So, going back to the six-year-olds  
2 playing kickball on the asphalt, let's say this is -- I'm just  
3 sort of hypothesizing here -- let's say there was a lawsuit in  
4 which some really good things were going to be done that would  
5 be helpful to the third grader and -- but the third grader  
6 couldn't have them because no one could represent the third  
7 grader because no one would know if the third grader was going  
8 to grow up to be a football player or not?

9           So, would the answer to that be: Too bad, we can do  
10 whatever we want until you hit 12th grade? Or is there some  
11 allowance that would or should or could be made to say that  
12 there is a way to get benefits for people who are not yet in  
13 need of them?

14           **MR. KESSLER:** So, Your Honor, our --

15           **THE COURT:** The *Payment Card* case, the merchants who  
16 weren't taking payment cards were benefited. When they ended  
17 up getting -- opening a little store and wanting to take credit  
18 cards, they were benefited by the fact that there was an  
19 injunction that said you can't do whatever it was that they  
20 were doing, re-up charges or so on.

21           And if you couldn't have a class of future people, you  
22 couldn't have a benefit for future people.

23           Do you have any answer to that or any solution that a  
24 person in that position might be able to come up with?

25           **MR. KESSLER:** To whom are you addressing that,



1 Your Honor?

2 **THE COURT:** Mr. Broshuis, but I will ask you next.  
3 Don't worry.

4 **MR. BROSHUIS:** Sorry, I thought you were addressing  
5 Mr. Kessler or Mr. Berman with that question.

6 So, we also agree that it's very problematic, yes, that  
7 you don't even know who these future class members are going to  
8 be.

9 **THE COURT:** Right. So, should that mean they don't  
10 get anything; that they don't get reforms to a system that they  
11 might end up in?

12 **MR. BROSHUIS:** I think the answer is that it cuts both  
13 ways; right. So, yeah, maybe some of these benefits they like.  
14 Some of these things they don't like. But the problem from a  
15 due process standpoint is that they don't have a choice because  
16 at that point -- at the time they become athletes, the train  
17 has already left the station. And so, they have had no input  
18 in the process at all.

19 Now, Mr. Kessler will cite to you, you know, past cases  
20 that involved athletics but all of those cases were meshed  
21 within a union as well; and so the union had some involvement  
22 with those cases.

23 And it's also important to note that one of those cases,  
24 the Eighth Circuit case in *White*, was later aggregated in a  
25 Supreme Court case when it comes to adequacy of the

1 representation. So, I think it calls into question that entire  
2 line of cases.

3 **THE COURT:** Mr. Kessler, did you want to respond?

4 **MR. KESSLER:** Yes, very briefly. So, Your Honor, is  
5 quite right. The future settlement provides this incredibly  
6 improved system for every future athlete who comes into the  
7 NCAA into Division I where there is now going to be billions of  
8 dollars of compensation available that was never available  
9 before; no scholarship limits without having to wait and bring  
10 their own antitrust case in the future taking years of  
11 litigation and probably graduating before they ever get any  
12 relief.

13 This is a game changing future, and the difference  
14 between -- you asked with the Second Circuit cases -- is that  
15 every one of the cases that has found a need for separate  
16 counsel is because they found that there was evidence that the  
17 injunctive class members were sold out in some way in exchange  
18 for benefits to the damages class members, every one where that  
19 has happened.

20 Here, the injunctive class members are frankly getting the  
21 most historic unpredicted relief in the history of the NCAA,  
22 and it was negotiated first. And there are many, many cases,  
23 which we cite in our brief including the sports cases, where  
24 the same counsel negotiated -- like the *White* case, the same  
25 counsel negotiated the injunctive relief and negotiated the

1 damages.

2 It was challenged by objectors. The Eighth Circuit found  
3 there was a wonderful benefit for all of the class, and he is  
4 wrong to say, well, there was a union. There actually was no  
5 union at the time that the Reggie White settlement was done.  
6 The union came later, and yet all of this relief was negotiated  
7 together because in these sports cases you need these multiyear  
8 settlements to create a new injunctive system that makes sense  
9 to have a compromise.

10 Otherwise, it is endless litigation. Your Honor knows we  
11 have already been in ten years or more of litigation, if you go  
12 back to *O'Bannon*, it may seem endless to those who have been  
13 involved in it.

14 This injunction is a way of changing the world where these  
15 future cases hopefully are not going to be needed.

16 **THE COURT:** Okay. Why don't we move onto -- there is  
17 still a cap argument. Some people -- objectors, I guess -- say  
18 that while the cap used to be one dime, anything over -- or was  
19 it a penny, Mr. Kilaru? -- anything over a penny was  
20 pay-for-play, and now it's up to the -- some percentage of  
21 20 million but it's still a cap.

22 So, is that wrong?

23 **MR. KESSLER:** So, Your Honor, I will address that.

24 **THE COURT:** Mr. Broshuis.

25 **MR. BROSHUIS:** Yes, I can address that, Your Honor.

1 We do think it is problematic because all of these  
2 changes, they are important changes to the industry. They are  
3 revolutionizing the industry, and it is outside of collective  
4 gaining. And the cases say that a new cap --

5 **THE COURT:** Collective bargaining. There are cases  
6 like that floating around or being talked about, but there is  
7 nothing I can do about that except to say it says in the  
8 settlement agreement that they won't take any stance against  
9 collective bargaining. But, go ahead.

10 **MR. BROSHUIS:** And the reason I mentioned collective  
11 bargaining, Your Honor, is solely for the reason that outside  
12 of collective bargaining, caps are generally illegal because  
13 you still have horizontal competitors who are agreeing to cap  
14 the amount in a certain way.

15 Now, through collective bargaining, you have the  
16 non-statutory labor exemption come into play. So, that's why a  
17 cap is problematic still. And it's not just us saying that.

18 **THE COURT:** I don't get what you are saying. Try that  
19 point again. I just didn't follow it.

20 **MR. BROSHUIS:** You are substituting one cap for  
21 another cap.

22 **THE COURT:** Okay, a very much higher cap for an  
23 illusory one. But go ahead.

24 **MR. BROSHUIS:** And it is not just us saying that.

25 One of the things that they pointed to in their opening

1 brief in footnote 7 is they had said they would ask the  
2 National College Players Association led by Ramogi Huma for his  
3 input on whether this makes sense from a cap perspective, from  
4 the perspective of roping in new individuals.

5 Well, we know what his -- what his position is now because  
6 his group, the National College --

7 **THE COURT:** We are not trying this in the newspapers.  
8 I saw the article too. That's not evidence and that's not what  
9 we are dealing with here.

10 **MR. BROSHUIS:** It is indicia, I think, of class  
11 members' reaction, though, and how important advocacy groups  
12 are looking at this. And so, that was my -- solely my point.

13 **THE COURT:** I see, okay. I can't remember if I said I  
14 would let you talk on this point or not.

15 **MR. KESSLER:** Would you like me to address the cap  
16 issue or it's up to you.

17 **THE COURT:** If you have anything you want to add,  
18 yeah, go ahead.

19 **MR. KESSLER:** Just so -- every settlement is a  
20 compromise. Your Honor knows that; right.

21 We sue. We would have liked an injunction that said there  
22 is no cap, right, but when you settle you get a compromise; and  
23 the cap we agreed to -- our economist estimates -- will get  
24 Division I athletes in the future about 51 percent of all the  
25 revenues, which almost mirrors the competitive market outcome.

1        So, this is an extraordinarily beneficial cap. And the  
2 fact that you can have these is illustrated by all the sports  
3 settlements. In the *Reggie White* class, in the *Junior*  
4 *Bridgeman* case, in the *Robertson* case, all those were antitrust  
5 class action settlements that imposed -- they didn't get  
6 complete free agency with no limits. They got a new  
7 compromised system.

8        Your Honor's own injunction in *Alston*, as you know, we  
9 would have liked unlimited cash compensation. We didn't get  
10 unlimited cash compensation in all *Alston*. You gave cash  
11 compensation can only be for the scholarship awards, the  
12 academic achievement awards up to \$5,960, I think it is, which  
13 is what they were doing for the athletic achievement awards.

14        You can say that's a cap in your injunction. That's not a  
15 cap. What that is, is Your Honor said, "You can't have  
16 restrictions that go beyond this. You have to at least allow  
17 that," a perfectly appropriate antitrust injunction.

18        What our injunction says, you can't have restrictions that  
19 deprive the athletes from getting at least 22 percent in these  
20 new benefits, which together with all these other benefits end  
21 up equaling more than 50 percent. There is nothing wrong with  
22 that.

23        And if we are wrong, if this is a future antitrust  
24 violation, there is no release of future damages claims. I  
25 don't think it is but this case is not resolving that issue,

1 but this type of compromise release is the only way to settle  
2 and bring stability to these types of antitrust claims for  
3 athletes as a class basis; and I believe it is totally  
4 appropriate. It's been affirmed by the Second Circuit in  
5 *Robertson*. It has been affirmed by the Eighth Circuit in  
6 *White*.

7 **THE COURT:** Okay.

8 **MR. MOLO:** In the *White* case it was a 67 percent share  
9 as opposed to 22 percent, the cap. And *White* also allowed for  
10 a further increase of that. So, it is materially different in  
11 terms of what we are talking about here qualitatively.

12 This is still a restraint on trade. It is. And they have  
13 got to offer a pro-competitive justification for it, as  
14 Your Honor is well aware. That hasn't been done.

15 And the fact that someone is getting more money under a  
16 cap than they would have in a prior cap doesn't make it any  
17 less of a cap, any less of a restraint on trade.

18 **MR. KESSLER:** So, I will forgive Mr. Molo because it  
19 is not his case. It was my case.

20 The idea that it was 67 percent of all revenues in *White*  
21 is absolutely false. It was a defined group of revenues that  
22 if you compared to this settlement, the settlement percentage  
23 of revenues in *White* was less than the settlement here. And I  
24 did both agreements.

25 (Pause in proceedings.)

1           **THE COURT:** Okay. Let's talk about the third party  
2 NIL restrictions. I'm quite concerned about those.

3           The state of the briefing is that the settlement agreement  
4 has some language about what kind of third party NIL that  
5 athletes can get, and it refers to the business purpose and  
6 something else.

7           **MR. KILARU:** Your Honor, can I maybe assist on that?  
8 But I'm happy to wait for your question if you would like.

9           **THE COURT:** Yeah, I'm just trying to think. There are  
10 two things that it asks for. One is a business purpose and the  
11 other is something else.

12           What the Plaintiffs' answer to that is, oh, those things  
13 are already in effect, so it's not going to be any worse and  
14 please look at these guidelines at a certain web page, which I  
15 did. And on that web page it did say things about third party  
16 NIL but it said slightly different things.

17           And what I'm concerned about is whether the change as to  
18 what's in the guidelines to what's in the settlement agreement  
19 is going to mean that some people who are getting large sums of  
20 money in third party NIL right now will no longer be able to  
21 get them. That's my concern.

22           So, maybe -- it's a really addressed to Plaintiffs in the  
23 first instance. So, let me ask them what they think and then  
24 you can respond.

25           **MR. KESSLER:** So, Your Honor, I will take that first



1 and then Mr. Kilaru may want to --

2 **THE COURT:** You are going to have to get closer to the  
3 mic, though.

4 **MR. KESSLER:** Sorry. Your Honor, can you hear me now?

5 I will address that first and then maybe Mr. Kilaru wants  
6 to add in from the Defendants' perspective.

7 So, first of all, let's distinguish third party NIL from  
8 the issue of the collectives; right. There is not limit --

9 **THE COURT:** Distinguish them, aren't they the same?

10 **MR. KESSLER:** No. So, the agreement clearly says  
11 there is no limitation at all on third party NIL, like from  
12 Nike or from a car dealer or from some other brand or anyone  
13 else who is there. There is zero limitation in that.

14 And, in fact, the settlement agreement protects that by  
15 saying the current NIL -- the current NCAA rules which do not  
16 prohibit third party NIL must remain in effect. They can't  
17 adopt any new rules to make it more restrictive. And, by the  
18 way, that third party NIL doesn't even count against the pool  
19 cap. So, that's unchanged.

20 **THE COURT:** No. The things -- the thing that is  
21 currently there -- at least the only thing that was pointed out  
22 to me was these guidelines, which are quite strict. They talk  
23 about recruitment; that there can't be any recruitment. And I  
24 don't know if there is, but you certainly read about things in  
25 the newspapers.

1           **MR. KESSLER:** So again, Your Honor, I'm just talking  
2 now about the settlement.

3           **THE COURT:** Are you going to continue to go on?

4           **MR. KESSLER:** So, the settlement agreement treats  
5 collective rules different than the rules applicable to Nike or  
6 to somebody else. I just wanted to start with that.

7           **THE COURT:** I don't see the difference. What is  
8 the -- what is the --

9           **MR. KESSLER:** Well, the settlement --

10          **MR. KILARU:** Your Honor, can I -- just briefly on  
11 this, Your Honor, I think it is really important to understand  
12 what the current rules are before we go to what the change is  
13 in the rules.

14          So, the current rules are that pay-for-play is forbidden.  
15 That's in the policy Your Honor was mentioning. And that's  
16 true in the context of institutions. Also true in the context  
17 of NIL.

18          The July 1st guidance -- which, I believe, is what you are  
19 referring to -- says you can't have improper inducements,  
20 pay-for-play, and you can't have recruiting that gets you to  
21 come to a school.

22          So, that's still -- like today without the settlement,  
23 there is a ban on pay-for-play. And booster NIL payments or  
24 NIL payments that are not for legitimate NIL are currently  
25 prohibited. That is the status of the rules that exist.

1           **THE COURT:** What's going on about that?

2           **MR. KILARU:** Your Honor, I'm not going to comment,  
3 respectfully, on what is or is not going on in terms of NCAA  
4 enforcement; but I will say that that is the rule that's on the  
5 books.

6           And in this settlement that Mr. Kessler and Mr. Berman  
7 mentioned earlier --

8           **THE COURT:** What if we -- that we use that rule in the  
9 settlement agreement and said the rule -- the rule for third  
10 party NIL is and then quote your guidelines -- your guidance?  
11 Would that work?

12           **MR. KILARU:** No, Your Honor. I mean, we --

13           **THE COURT:** What they are doing now?

14           **MR. KILARU:** Your Honor, we don't think that works --

15           **THE COURT:** Why?

16           **MR. KILARU:** -- because something that we negotiated  
17 for -- and as Mr. Kessler and Mr. Berman said earlier is  
18 inherent in a settlement -- you work out a compromise.

19           Our position is that pay-for-play is prohibited. And  
20 Your Honor -- I can explain why that matters, but Your Honor  
21 and the Ninth Circuit have both agreed with that.

22           We think and maintain and even maintained in the *House*  
23 litigation that third party payments that are not for true NIL  
24 are pay-for-play and are banned.

25           That was our litigation position in the case and we pushed

1 it through. And, you know, the case didn't go final because we  
2 reached a settlement. So, what we are doing in the  
3 settlement --

4 **THE COURT:** I'm sorry. Which case are you talking  
5 about now?

6 **MR. KILARU:** In *House* there was a challenge to both  
7 the old NIL rules and even to the July 1st policy. And our  
8 position in that case, our position publicly, our position  
9 generally is that it is pay-for-play if you don't have NIL  
10 value that's actually NIL and is instead a booster trying to  
11 pay someone to induce them to come to school or not.

12 So, we were defending that rule in court. And in the  
13 context of the settlement we reached a compromise, which is as  
14 follows: As Mr. Kessler said, if it is real NIL, there is not  
15 a restriction on it. If it comes from a booster, it gets  
16 evaluated carefully for whether or not it is real NIL or not.

17 And then in the event that it is determined that it is not  
18 real NIL, there is a new back-end procedure that doesn't exist  
19 today.

20 So, today if the NCAA -- if we think that there is a rules  
21 violation, we go into enforcement. Tomorrow, if you approve  
22 the settlement, that will go into an arbitration process. So,  
23 this is we think and then the Plaintiffs believe it is an  
24 approved -- excuse me, Your Honor.

25 **THE COURT:** Excuse me. It goes first to a thing you

1 are calling DEE -- which I forget what it stands for. It is an  
2 NCAA agency as far as I can tell. It is not clear to me who  
3 they are and where they come from and so on but that's where it  
4 goes. And then after that, it goes to an arbitrator maybe.

5 **MR. KILARU:** That's correct, but there is always  
6 someone who makes an initial enforcement decision. And the  
7 settlement is clear that the penalty doesn't take effect if  
8 there is a challenge at arbitration.

9 So, that is all new. That does not exist today. So,  
10 again, this goes into the context of things that we negotiated  
11 in the discussions.

12 I'm sure the Plaintiffs believe -- and I'm sure they will  
13 speak to this -- that it is an improvement from the status quo.

14 It is also defensible under the law given that  
15 pay-for-play bans have been upheld by many courts including  
16 this Court in the Ninth Circuit in *Alston*.

17 **THE COURT:** But in this *House* settlement if it is  
18 approved, you will be explicitly paying for play or allowing  
19 schools to pay-for-play. So, this no play for pay thing isn't  
20 going to be there anymore, is it?

21 **MR. KILARU:** It is, Your Honor. There is still going  
22 to be a prohibition on pay-for-play, and there is discretion  
23 for schools to make payments as they see fit under the new  
24 regime.

25 **THE COURT:** And that won't be pay-for-play?

1           **MR. KILARU:** No, Your Honor. But, I mean, whatever --  
2 I think that's correct, but I think setting that aside, the  
3 fact of the matter is bans on pay-for-play have been upheld  
4 time and time again. This is litigation challenging bans on  
5 pay-for-play. This is something that came out of the  
6 settlement process. I believe Plaintiffs believe it is an  
7 improvement for the status quo, and for us it is an essential  
8 part of the deal.

9           **THE COURT:** Wow. I'm trying to find -- I have got so  
10 many notes here. I'm trying to find my notes of what the  
11 settlement agreement says about third party NIL and how it  
12 differs from -- how it differs from the guidance that's -- I  
13 found on the web page, but my court reporter needs a break.  
14 So, it's 4:00 o'clock. We are going to break until -- it is  
15 4:02. We will break until 4:12 if that's enough for you,  
16 Marla.

17           So we can all find what I'm talking about on the break.  
18 What I would like you all to do, I think would work, would be  
19 if everyone simply turned off their video and turned off their  
20 audio and does whatever they want until 10 minutes from now;  
21 and then we will come back and we turn on our video and turn on  
22 our audio and we don't talk until everybody is back in. Does  
23 that work, Tracy?

24           **THE CLERK:** That sounds great, Your Honor.

25           **THE COURT:** Okay.

1           **THE CLERK:** So, the court will be in recess until  
2   4:12.

3                               (Recess taken at 4:02 p.m.)

4                               (Proceedings resumed at 4:12 p.m.)

5           **THE COURT:** Hello, everybody. It looks like we are  
6   all here. Maybe not Mr. Molo. So, we will go ahead. Okay,  
7   thank you. Are we ready otherwise, Tracy? Oh, and there is  
8   Mr. Molo.

9           So, I just heard from Mr. Kilaru and I found the thing I  
10   was looking for. The settlement agreement talks about a  
11   business purpose for the NIL and the fair market value of the  
12   NIL. The guidance talks about the worth of the NIL and that  
13   there can't be any recruitment.

14          So, what are we going to do with this? Do we go with the  
15   settlement agreement? Do we go with the guidelines? Do we  
16   come up with something new?

17          I found that taking the things away from people is usually  
18   not too popular. So, I don't know who to call on, maybe  
19   someone from Plaintiff or did I interrupt you in the middle of  
20   your thought, Mr. Kilaru?

21          **MR. KILARU:** No. I think Mr. Kessler was going to  
22   address it.

23          **THE COURT:** Okay.

24          **MR. KESSLER:** So, Your Honor, let me start out by  
25   saying we are happy to change it to the guidelines, but I don't

1 think the NCAA is. So, we don't have a meeting of the minds on  
2 that; but from our perspective, we do not expect third party  
3 payments from collectors to be reduced as a result of this  
4 settlement.

5 And I will explain why. If anything, we believe they are  
6 going to continue to increase. And, in fact, that's what's  
7 happening right now every day. The collectives are raising  
8 more and more money to support the schools about this.

9 The reason we do not think this will decrease in any way  
10 is we have to compare the world before the settlement and the  
11 world after the settlement with regard to third party  
12 collective payments.

13 And I want to be clear. This only applies to collectives.  
14 No one has ever challenged, will challenge, if Nike is going to  
15 do a deal with athletes as they do or any of these other -- it  
16 has nothing to do with collectives.

17 There is no rule about them regarding business purpose or  
18 fair market value. It specifically has to do with when  
19 collectives are doing these NIL payments. So, I just want to  
20 put that aside.

21 **THE COURT:** Collective, either in the guidelines or  
22 the settlement agreements. So, you are talking about some  
23 difference between the collective and NIL, but I don't  
24 understand what that is. It seems to me that -- all I know is  
25 what I read in the papers and what I have read in your papers;



1 but it seems to me that collectives --

2 **MR. KESSLER:** Okay. So the rule you are referring  
3 to --

4 **THE COURT:** Might be justified or perhaps  
5 disingenuously justified by calling it NIL opportunities, and  
6 either it is or it isn't; but what do you propose to do about  
7 it?

8 **MR. KESSLER:** Okay. So, let me just refer to the  
9 rule. The rule that you are referring to in the settlement  
10 agreement is Section 3A in the appendix, and Section 3A is  
11 specifically about boosters and collectives.

12 You will see it says (as read:) "NCAA and conference rules  
13 prohibiting individually or collectively of a -- "boosters,  
14 individually or collectively" -- the collective of boosters is  
15 what we call collective; okay -- "of a member, institution from  
16 entering into NIL licenses with or for the benefit of current  
17 NIL athletes."

18 That's where they say that it is allowed unless the  
19 license payment is for a valid business purpose, et cetera.

20 So, I want to say this is only something that applies to  
21 boosters individually or collectively, someone affiliated with  
22 the school. If you are not affiliated with the school like  
23 Nike, this rule doesn't apply.

24 Okay. It doesn't --

25 (Pause in proceedings.)

1           **MR. KESSLER:** You are shaking your head, Your Honor,  
2     so I --

3           **THE COURT:** These boosters, you can't prove that they  
4     are connected with the school. Maybe they live in the same  
5     town. Maybe they live in the same state. Maybe they went to  
6     school there. Who knows why they want to do it, but some of  
7     them at least clearly, I assume, have some sort of connection  
8     to the school.

9           How are you going to adjudicate -- enforce something like  
10    that? Tell me the number again of the -- I have got the  
11    injunctive relief settlement right here. Tell me --

12           **MR. KESSLER:** Section 3A, page 19 of the appendix.

13           **MR. MOLO:** Article IV, Section 3A, page 18, yep.

14           **THE COURT:** And what -- so, the way I shorthand this  
15    is, is this purpose or fair market value versus worth of NIL  
16    and no recruitment in the --

17           **MR. KESSLER:** And I'm going to address that,  
18    Your Honor, but I just want to maintain that if it's not a  
19    booster -- and I understand you can argue who is a booster,  
20    right, but everyone would say, for example, if Disney decides  
21    to do an endorsement deal with an athlete, no one is going to  
22    say Disney is a booster; right.

23           So people -- unrelated organizations are not at all going  
24    to be subject to this. I just wanted to make that point.

25           **THE COURT:** That's not enough. I mean, that doesn't

1 answer the question. What if Mr. Fan loves his team and wants  
2 to give them all a truck or wants to give them a million  
3 dollars to get a new player or -- is that a booster? I don't  
4 know. Is that a third party NIL giver? I don't know. Is it a  
5 collective? Maybe he has got a friend, there are two of them,  
6 so it is a collective.

7 **MR. KESSLER:** So, booster is a defined --

8 **THE COURT:** Is having your team win a valid business  
9 purpose?

10 **MR. KESSLER:** So --

11 **THE COURT:** Rates commensurate with compensation to  
12 similarly situated individuals who are not at the  
13 member/institution.

14 So what, we look at other schools and see if anybody is  
15 giving them a million dollars; and if the million dollars is  
16 the test, then it's okay. But if nobody else gets a million,  
17 then you can't get a million either? I mean, how does this --  
18 how would this ever be interpreted?

19 **MR. KESSLER:** Okay. So, first, to address booster, it  
20 is a defined term, which is on page 2 under the things -- it's  
21 someone who the NCAA regulations define as a booster, as a  
22 representative of athletics interest. You can say that's good  
23 or bad, but it is a very specific term in their regulations now  
24 that they have distinguished between boosters and non-boosters  
25 that have different rules.

1 But I want to get to your more important, Your Honor. The  
2 more important point is that under their current rules all of  
3 this is prohibited. Anything that is -- they consider to be an  
4 inducement for recruitment -- you know, helping to pay for the  
5 athlete's services by a booster is prohibited.

6 The difference now is that if they decide to enforce it;  
7 they bring their charges; they have an enforcement unit; they  
8 have a decision unit; and they do the appeal and whatever they  
9 decide goes. That's the current situation.

10 In the new situation with the settlement, they can bring  
11 the same type of claim against the booster but a neutral  
12 arbitrator who will be jointly selected decides this and you  
13 can challenge what they are doing.

14 So whatever their enforcement has been or not been, we  
15 don't see this making it any worse.

16 Having said that, Your Honor, I have no problem using the  
17 existing language. That obviously came from the NCAA side in  
18 terms of that.

19 **MR. KILARU:** Your Honor, I don't know if you are  
20 intending to let others speak on this but if you are, that's  
21 fine. We would like to say something on this, but I'm happy to  
22 let others go if that's helpful.

23 **THE COURT:** I don't think anybody else has much new to  
24 say about it except the lead counsel for the parties. So,  
25 yeah, I would like to hear what you think could be done.

1           **MR. KILARU:** I think there is three issues,  
2 Your Honor, and I would say the bottom line from our  
3 perspective is there isn't anything that can be done. Let me  
4 just explain why that is. So, first of all --

5           **THE COURT:** Well, that's discouraging.

6           **MR. KILARU:** I don't think it needs to be  
7 discouraging, Your Honor, because it is about what Mr. Kessler  
8 said, which is compare the status quo before to the status quo  
9 after.

10           So, first of all, "booster" is a defined and understood  
11 term. It has been in the NCAA rulebook for decades. It has  
12 been operated. It has been applied. That's understood. So,  
13 that's not some new and amorphous term that's out there.  
14 That's from the rulebook.

15           Currently, boosters cannot make payments that are  
16 pay-for-play. They cannot make payments that are inducements.  
17 That is the rule. And at any moment that rule can be enforced  
18 by the NCAA in a proceeding that would say a payment is  
19 impermissible; student is ineligible, so on and so forth.

20           And then that would have to go through a very complicated  
21 legal process to challenge that. That is the status quo today.

22           **THE COURT:** What about if graduated and gotten a job  
23 at the local McDonald's?

24           **MR. KILARU:** The status quo today is that this rule  
25 can be enforced and applied at any time. That is what the rule

1 is right now. It is the rule on the books. It is the rule the  
2 member institution has agreed to. It is the rule that applies  
3 to student athletes.

4 And we think that it is a manifestation of a broad  
5 prohibition on pay-for-play that has been deemed  
6 pro-competitive. That's point number one.

7 Second, in the post world, the world if the settlement  
8 goes through, that's a better regulatory environment for  
9 student athletes because, as Mr. Kessler said, payments that  
10 are not made by third parties -- excuse me -- payments that are  
11 not made by boosters defined in NCAA rules are fine.

12 Payments that are made by boosters go through a process,  
13 and that process is the enforcement entity that we talked about  
14 reviewing. And if there is a problem, unlike today, there is  
15 arbitration before that penalty goes into effect. That is an  
16 improvement from student athletes' perspective on the status  
17 quo.

18 If the NCAA enforced tomorrow against an institution or a  
19 student athlete for an improper booster payment, that would  
20 have immediate effect.

21 Last, to Mr. Kessler's point, pre versus post settlement.  
22 Presettlement there is this third party NIL, and there is not  
23 this potentially huge amount of new money that is being  
24 provided directly from schools to student athletes.

25 Post, you will have not only third party NIL; but you will

1 also have substantial benefits flowing directly from  
2 institutions to student athletes; and that is the appropriate  
3 comparison because this provision was carefully negotiated. It  
4 is an essential part of the deal. And without it, I'm not sure  
5 there will be a settlement to submit.

6 We think you look at the pre without -- I think, like,  
7 look at all of the things the Plaintiffs just said about the  
8 benefits that are going to flow from schools, the billions of  
9 dollars. This is part and parcel of getting that in the  
10 future.

11 **THE COURT:** Yeah, except that the schools don't have  
12 to pay those benefits; and the schools may or may not be able  
13 to pay those benefits, but clearly the collectives or the  
14 boosters or the third parties do have those resources and are  
15 willing to pay them, apparently. I mean, that's what I  
16 understand.

17 But let me ask you this: This definition of "booster" is  
18 someone that you knew or should have known has assisted in  
19 providing benefits to student athletes.

20 So, today's third party donor is tomorrow's booster  
21 because by tomorrow you know that they are people who like to  
22 give money to athletes and now they are a booster and now they  
23 have to -- now, they can't do it anymore.

24 **MR. MOLO:** Your Honor --

25 **MR. KILARU:** Your Honor, I think --

1           **MR. MOLO:** Under the definition, which is -- the  
2 settlement agreement cites to the NCAA, you know, regulation of  
3 the rule; and it says that a booster is defined as (as read:)  
4 "any individual independent agency corporate entity; e.g.,  
5 apparel or equipment manufacturer or other organization that  
6 has promoted or assisted the school's athletic department or  
7 the student athlete."

8           That's at -- we quote from that at page 17 of our brief,  
9 we quote the actual rule. So, it is broader. You are correct  
10 about that. It is not just limited to somebody who was an alum  
11 or a fan of the school.

12           **THE COURT:** Well, I think we have got problems with  
13 this, and I don't know -- I don't have a -- I don't have an  
14 idea of how to fix them.

15           So, I think I'm just going to have to throw this back on  
16 you-all to see if you can come up with something better,  
17 something that's workable, that's consistent with what -- at  
18 least acknowledges what it used to be and exchanges that with  
19 something that makes sense and that's understandable and  
20 enforceable and fair keeping in mind that taking things away  
21 from people generally doesn't work well.

22           I saw a chart somewhere of all of the money that certain  
23 athletes had received from collectives, and it was, like, the  
24 first one on the list was 91,000; and there were others that  
25 were more and some that were less but maybe --



1           **MR. KILARU:** I think there is -- I guess I would say  
2 two things, Your Honor. I think the first is, again, if those  
3 reports are true -- and I would like to address that -- all of  
4 that could be prohibited by the drop of a pen at any point  
5 under the current rules; but I would also note, as you said  
6 earlier, this case isn't about the newspapers. It is about the  
7 record.

8           There is in the record in this case a massive amount of  
9 data about NIL, and it doesn't match what these public reports  
10 say because often these public reports are about contracts that  
11 are never performed on, that involve terms being offered to  
12 athletes that actually have all kinds of poison pills that  
13 don't work that often never get realized because there is abuse  
14 and other things that are built into this current marketplace.

15           So, that's the reality right now. And if you look at the  
16 evidence and the stuff -- the documents and the data you have  
17 in this case, it doesn't match whatever newspaper reports are  
18 saying.

19           And it is actually something that has been reported on  
20 recently now that there is a tool in the NCAA called NIL Assist  
21 that reflects what the deals actually are.

22           So, I don't think it is appropriate to blow up the deal on  
23 the basis that there might be some payments that could be made  
24 that may or may not exist after this rule.

25           If those payments are being made, there's not evidence of

1 them in the record in this case. If those payments are being  
2 made, they can be stopped through an enforcement action  
3 tomorrow.

4 And if the settlement is approved in its current form --  
5 and this is an essential part of this being in its current  
6 form -- those deals will go through a review process, and there  
7 will be arbitration on the back end.

8 **THE COURT:** What is the tool you are referring to?  
9 What's it called?

10 **MR. KILARU:** It is called NIL Assist. There has been  
11 reporting on this. It basically puts out information on what  
12 the deals are, but you have a lot of confidential information  
13 in the *House* record that underlaid the damages models in this  
14 case that shows what the deals were because that was something  
15 that was provided in discovery. And there just aren't these --

16 **THE COURT:** It was under seal and shouldn't have --

17 **MR. BROSHUIS:** Your Honor, if I can just speak to that  
18 for one minute.

19 **THE COURT:** We are going to have to go on. And I  
20 think what occurs to me as you speak is that -- I haven't  
21 talked about *Hubbard* yet -- but part of *Hubbard* is for everyone  
22 to report their NIL deals.

23 So, maybe -- I was going to ask you anyway whether we  
24 shouldn't just proceed with *Hubbard*; preliminarily approve  
25 *Hubbard* and go ahead and finalize *Hubbard*.

1 While we do that, we will get all of this information  
2 about approximate NIL deals that we can then use to try to  
3 figure out what to do about *House*.

4 **MR. KILARU:** The approved requirement -- the reporting  
5 requirement is in *House*, not *Hubbard*. *Hubbard* is about *Alston*.  
6 The approval is in *House*. The requirement that you submit NIL  
7 payments is in *House*.

8 **THE COURT:** Right.

9 **MR. KILARU:** There is also data being generated in  
10 real-time in *House* that is being reported through the NCAA.

11 **THE COURT:** Okay, and that you have shared or will  
12 share with the Plaintiffs so they can evaluate it?

13 **MR. KILARU:** Well, they got it from us. They  
14 subpoenaed our institutions for the NIL data, so they have it;  
15 and they had that when they agreed to this term as part of this  
16 compromise.

17 **THE COURT:** Okay. Well, unless Mr. Berman or  
18 Mr. Kessler can solve this problem or make a useful suggestion,  
19 I think what I will do is just ask you to go back to the  
20 drawing board on this point; and I will finish up today by  
21 going on to my other questions.

22 **MR. KESSLER:** I think, Your Honor, we are going to  
23 have to discuss it with the NCAA. We think it should be  
24 possible to address Your Honor's concerns and address their  
25 needs because I think the concept is that whatever is -- we are

1 not -- we were not trying to make anything prohibited that is  
2 not already prohibited with respect to the boosters; and we  
3 could add in language and things to make that clear, but let us  
4 talk to the NCAA about that.

5 This was not designed to eliminate NIL from boosters that  
6 currently has been permitted. So, we can work that out, I  
7 think, with them.

8 **THE COURT:** That might be your view but I'm not sure  
9 that's the NCAA's view; but anyway, let's go onto some other  
10 points. We still got things to talk about here. Well, maybe  
11 not so much anymore.

12 (Pause in proceedings.)

13 **THE COURT:** There are some objections about the pool  
14 calculation being overstated, but I think I could just deal  
15 with the briefs on that.

16 There was arguments about attorneys' fees and clear  
17 sailing provisions and so on. There is some dispute about  
18 that. I think I can figure that out unless the problem is the  
19 definition of clear sailing agreement, which to me is the  
20 attorneys get a fee that the Defendants agree not to object to  
21 and nothing more, nothing less. Is that what everyone is going  
22 by?

23 **MR. BERMAN:** That's my understanding.

24 **MR. KESSLER:** I think those issues can be addressed  
25 when we do our fee petition, which is separate.

1           **THE COURT:** There is something wrong with your mic or  
2 where you are standing or something. I could turn you up, but  
3 then I will be turning everybody up. Maybe you've got your --

4           **MR. KESSLER:** I'm sorry, Your Honor, I don't know why.  
5 But I was going to say, we subsequently are going to file our  
6 fee petition. We don't think we have any clear sailing  
7 provisions. We can address all of that, you know, at the time  
8 of our fee petition.

9           **THE COURT:** Okay. Oh, the stay. What I thought about  
10 the stay is it feels sort of unseemly to me to be telling  
11 another judge what she can do with her cases.

12           What I would say is that I certainly would assume that  
13 knowing what's going on in this case that another judge who had  
14 a similar case or the attorneys who are handling it might see  
15 there way clear or might see it is in everyone's interest not  
16 to do a lot of time consuming and expensive work while they are  
17 waiting to see what is going to happen.

18           And those of you who are in front of the Colorado judges,  
19 I would assume could go to them and say, "Let's have a case  
20 management proceeding whereby we will do maybe some discovery  
21 to get things moving so it's not delayed too long, but we won't  
22 do the class cert motion" or something along those lines.

23           I would be -- feel differently about staying *Cornelio* --  
24 if that's how you pronounce it -- because that was filed after  
25 the second amended complaint in *House*, and I would have a

1 different feeling about any new cases. If somebody starts  
2 filing them tomorrow or the next day, I wouldn't have any  
3 trouble staying those; but I'm reluctant to just out and out  
4 stay *Fontenot*. So, I don't know if anybody is upset by that.  
5 Who wants to address that?

6 **MR. KILARU:** Yeah, Your Honor, we think it should be  
7 stayed. And I think, first of all, there is no dispute, I  
8 think, among anyone that you can stay the case. I think you  
9 did it in *Alston*. I think you can do it.

10 **THE COURT:** Well, should I or not?

11 **MR. KILARU:** Right, but should you or not. And I  
12 think the key point to note is that this isn't sort of an  
13 ordinary circumstance where you have different class actions.  
14 The *Fontenot* proceeding is being used as a vehicle to  
15 collaterally attack the settlement in front of the Court.  
16 That's true and, in fact, they filed the *Cornelio* claim after  
17 the settlement was submitted.

18 It is true in that in every filing they have made in the  
19 *Fontenot* case, they have challenged the settlement including  
20 most recently in a motion to oppose us getting a little more  
21 time to respond to the compliant.

22 I don't know if I have ever heard of a motion to respond  
23 to the complaint being opposed on substantive grounds, but they  
24 threw in that there is a settlement approval and it is  
25 collusive, et cetera. And they are using discovery in that

1 case to try to probe the settlement discussions here.

2 So, I think there is a lot going on in that case that  
3 warrants a stay because it's not being treated as an  
4 independent litigation vehicle. It is also being treated as a  
5 way to probe and undermine the settlement here, which is very  
6 much in Your Honor's jurisdiction.

7 **THE COURT:** What about making such a motion before the  
8 Judge who is handling the case?

9 **MR. KILARU:** We can also do that, but I think  
10 Your Honor has jurisdiction over the settlement if there is  
11 one; and it's an appropriate exercise of jurisdiction here.

12 **THE COURT:** Why don't you try first taking the  
13 arguments that you just made to -- is it Judge Sweeney?

14 **MR. KILARU:** Yes.

15 **THE COURT:** Charlotte Sweeney, take those arguments to  
16 her. First, talk to the other side and see if you can't reach  
17 some kind of agreement just as to efficiency and case  
18 management. And if you can't, then make some sort of a motion  
19 to Judge Sweeney -- and you can tell her what I said. I don't  
20 know her. I haven't spoken to her -- but take it to her and  
21 tell her the problems you are having and ask her if she would  
22 give you some relief.

23 And if none of that works and you really feel badly about  
24 it, I will deny it without prejudice, you can come back and ask  
25 again.

1 Okay. So let's talk about *Hubbard*. Yes, sir.

2 **MR. BROSHUIS:** Yeah, just real quick, I want to -- I  
3 feel like I need to respond because Mr. Kilaru is suggesting  
4 that we have some sort of improper motives, and we certainly  
5 have zero improper motives.

6 **THE COURT:** I'm not positing any of that, and I didn't  
7 change my mind --

8 **MR. BROSHUIS:** Thank you, Your Honor.

9 **THE COURT:** -- so -- if you come back, which I hope  
10 you won't, on this point.

11 **MR. BROSHUIS:** Thank you, Your Honor.

12 **THE COURT:** Okay. So, I want to talk about *Hubbard*,  
13 though, and let me find my notes on *Hubbard*.

14 (Pause in proceedings.)

15 **THE COURT:** Oh, I did have one other question back on  
16 the injunction -- well, that's a can of worms. I will wait on  
17 that.

18 (Pause in proceedings.)

19 **THE COURT:** What would you say to the idea of  
20 proceeding with *Hubbard*? I know that you have got it set up  
21 now so that they both have to settle before either of them  
22 settles; but *Hubbard* is so much less complicated than *House*.

23 **MR. KILARU:** Your Honor, we wouldn't agree to approve  
24 one settlement without the other. They were negotiated  
25 separately and with all -- the mediator makes clear, but we



1 wouldn't agree to approval or submission of one without the  
2 other.

3 **MR. KESSLER:** So, Your Honor, our view would be they  
4 have an agreement that they could -- they could in effect opt  
5 out of *Hubbard* if the other settlements did not agree to. They  
6 are protected. No money will be distributed if the other  
7 settlements are not done.

8 But since there literally is no issue about *Hubbard* --  
9 other than the notice issue that Your Honor wants us to address  
10 with the notice forms, which we will do -- other than that,  
11 there is no reason not to just preliminarily approve *Hubbard*  
12 and let it go in advance.

13 There is really no prejudice to the NCAA regarding that,  
14 you know, because it is a very discrete issue. It is just  
15 damages. It is just very specific for these academic  
16 achievement award damages. It is a separate class. It is a  
17 separate fund, and they are still protected because no money  
18 will get paid out if it is not all approved if they don't want  
19 it to be.

20 **THE COURT:** There are two issues that I have  
21 identified with *Hubbard*. I hope I remember them now that I  
22 found them in my notes. One is the class period. The only  
23 time that people weren't doing academic achievement awards was  
24 the three years between, what, 2020 -- three academic years. I  
25 forget which ones -- 2020 through 2023.

1           However, the *Hubbard* class identifies five years going up  
2 to 2023 or '24, two more years.

3           Rascher doesn't give us the data for the second two years  
4 or the last two years. I don't understand why we have those  
5 two years in there. Why isn't it a three-year class?

6           **MR. KESSLER:** I think the claims only continue through  
7 when the damages -- when the benefits were prohibited, which  
8 was until 2021, but that if in defining the class, if there is  
9 someone who has those claims earlier -- in other words, there  
10 are not five years of payouts in terms of that.

11           **MS. PARSIGIAN:** Yeah. Your Honor, I think I can speak  
12 to this. For the court reporter, I'm Jeanifer Parsigian.

13           So, for the *Hubbard* case we have a single year where we  
14 are doing damages claims, the first year that the payments were  
15 allowed but -- and our position has been that the schools  
16 hadn't budgeted, hadn't caught up, and so athletes that would  
17 have gotten those awards did not that year.

18           Then the future -- the forward date of the class extends.  
19 Those individuals likely don't have any claims under *Hubbard*  
20 but the release is coextensive with other releases just of how  
21 we structured the classes here.

22           **MR. KESSLER:** But Your Honor is right. There are no  
23 claims after -- after 2021, '22, there are no damage claims  
24 asserted in *Hubbard*. They were never asserted.

25           And so, even though we can make the *Hubbard* class period

1 earlier, the NCAA wanted all the class periods to be all the  
2 same; but there are no claims after that date in there.

3 **MR. KILARU:** Your Honor, the class wasn't certified so  
4 the claim would have run past 2022. I mean, typically these  
5 things run from whatever the date of class certification is.

6 So, we think it is appropriate to have -- if we even are  
7 talking about *Hubbard* -- but I want to go back to that in a  
8 minute -- we think it is appropriate for the release to run to  
9 when it runs to because there are zero value claims once *Alston*  
10 payment was permitted; but there is a release and we want the  
11 release.

12 **MR. KESSLER:** Your Honor --

13 **THE COURT:** Does this have anything to do with the  
14 other non-academic achievement awards benefits that came out of  
15 *Alston*; the laptop, the internship, the whatever else, is that  
16 what's happening here?

17 **MR. KILARU:** I think benefits are being provided post  
18 *Alston* or they are not being provided all consistent with the  
19 permissive injunction that Your Honor entered.

20 You can either do it or not do it. That's been happening  
21 for quite some time. So, I don't think anyone would have a  
22 valid claim that they are being denied *Alston* payments under  
23 their school's criteria after the date on which their school  
24 started making payments.

25 There is no reason to not include that in the scope of the

1 release because the case would have gone forward if it went  
2 forward.

3           **THE COURT:** Okay. Here is another idea I have about  
4 *Hubbard*. You want to have everybody, I guess, find out -- or  
5 maybe they already know -- what the qualification rules were  
6 for each of the schools that a class member went to, and then  
7 you want to find out which years that class member played; and  
8 then you want to find out whether the class member qualified  
9 under the qualifications, which are all different -- they are  
10 not all different but some of them are different.

11           And they are under seal. And that's another thing we have  
12 got to get that resolved somehow with code names or something  
13 because people want to know and they have good reason to.

14           But the athletes then have to show that they would have  
15 qualified. So, School A says you have to have a 2.0, and  
16 School B says all you have to do is not flunk out; and School C  
17 doesn't care what your grades are. They just care if you went  
18 to school or not. It's all different. And then some of them,  
19 I guess, have different amounts. Most people gave the 5,980  
20 but not everybody.

21           So, and all of this has to be explained on the claim form;  
22 and all of this has to be calculated out. What if we just said  
23 everybody who was on a team at a school that had an academic  
24 achievement award gets \$6,000 a year for every year they  
25 played?

1           That's giving them an extra 20 bucks. How about that?  
2           Wouldn't that be really a lot easier and more understandable  
3           than trying to figure out what all these different  
4           qualifications --

5           **MR. KILARU:** Your Honor, we negotiated for a defined  
6           settlement amount. That's not even close to what we negotiated  
7           for; just say you have to pay everyone \$6,000 if they claim  
8           their school is making policies. I mean, not every school  
9           made --

10          **MS. PARSIGIAN:** If I may, that's what we have  
11          attempted to do by having the form look as it does. As you  
12          noted before, the vast majority of the criteria -- while they  
13          look extremely different in the appendix that you have seen --  
14          are -- go down to the reality that you are eligible,  
15          academically, athletically, and on a team.

16          And we think we can do this claim just with those four  
17          questions that we have asked and knowing the years and school  
18          that they have attended.

19          So, we can explain that further to Your Honor if you would  
20          like; but the vast majority of their claims were simply -- of  
21          the criteria were simply these four issues.

22          And if you met those four -- for example, if you are  
23          academically eligible, you have to have a 2.0. So, while those  
24          look different in all of the productions that the Defendants  
25          made, they are actually virtually identical.

1           So, we have worked through all of it and come up with a  
2 claim work that allows us if you have answers to those four  
3 questions to determine that you are eligible; and it is very  
4 similar, as Your Honor is saying, to the reality that they were  
5 simply on a team.

6           Some of them required they had a scholarship and some of  
7 them depend what sport it is on, but we know we can do it with  
8 just the information that we have asked for on the claim form.

9           **MR. KESSLER:** So, Your Honor, to make this very  
10 simple, we are agreeing on a very simple criteria as Your Honor  
11 is suggesting.

12           The only thing that Mr. -- that -- that NCAA counsel is  
13 pointing out, we negotiated an overall settlement amount which  
14 will not get \$6,000 to every one of those athletes because it  
15 is a compromise. It is a percentage of that number, so it  
16 won't be 6,000 but that just --

17           **THE COURT:** *Hubbard* --

18           **MR. KESSLER:** We got, like, 61 percent of the damages  
19 or something. So, it is not a definite number but they all  
20 will get it.

21           **THE COURT:** Okay. Maybe it is not 5,980. Maybe it's  
22 some other number. And that's another question I had is do we  
23 have a number from Dr. Rascher or anybody else that says what  
24 would the damages be if all these people did get everything  
25 they were supposed to?

1           How many athletes were there? How many schools had these  
2 things? How many of them were at the max? How many -- you  
3 know, there has got to be some sort of economic analysis that  
4 could be done and maybe --

5           **MR. KESSLER:** Yes, so --

6           **THE COURT:** -- and I just don't know what it says or  
7 maybe I do and don't have it in front of me, but that would be  
8 of interest. And then you can take that number, whatever it  
9 was; divide it by the number of school years -- student school  
10 years and give everybody however much it was supposed to be.

11           **MR. KESSLER:** So, Your Honor, we already have from  
12 Dr. Rascher an analysis which indicates he came up with what  
13 would be the actual damages in total versus the 200 billion we  
14 agreed to. And we have gotten 63.9 percent of the total amount  
15 of damages for everyone.

16           The only adjustment there is -- is if Your Honor awards  
17 attorneys' fees and costs, that obviously will further change  
18 the number at that point.

19           But we already know that, you know, subject to attorneys'  
20 fees and costs it's going to be 63.9 percent of that full  
21 number for all these athletes; and we have come up with a very  
22 simple way to let them qualify with just a few questions rather  
23 than having to show each individual tiny criteria that a school  
24 might have had when they were opposing class certification.  
25 So, we have come very close to what Your Honor is asking for.

1           **THE COURT:** And is the Defendant in agreement with  
2 that?

3           **MR. KESSLER:** I believe so. We only care about the  
4 200 million. They don't care about -- that we made very simple  
5 criteria for people to get it because it is a fixed sum  
6 settlement. It doesn't go up if there are more recipients or  
7 go down if there are fewer. They pay the 200 million. So, I  
8 think they are deferring to us as to how to divide it up to  
9 allocate it to the criteria.

10          **THE COURT:** The report you are referring to, is that  
11 in the record? Rascher's --

12          **MR. KESSLER:** Yes, the declaration is submitted.

13          **THE COURT:** Where is it?

14          **MR. KILARU:** It was filed along with their class  
15 certification papers. They filed class certification papers,  
16 Your Honor. It was filed with that.

17          **THE COURT:** Okay.

18          **MR. KILARU:** It was a total number of 313 million. We  
19 didn't file our opposition to that; but for purposes of  
20 settlement, we agreed the 200 million is an appropriate  
21 resolution. And, as Mr. Kessler said, defer to them on the way  
22 to allocating that to their putative class members.

23          **THE COURT:** I see. You don't care if they make  
24 everybody show their grade point average or not.

25          **MR. KESSLER:** So --



1           **MR. KILARU:** Your Honor, I don't know if we have a  
2 view on that, but I just want to be clear on something. We  
3 don't support preliminary approval of the *Hubbard* settlement  
4 standing alone.

5           And we disagree with Mr. Kessler; that you can sort of say  
6 it's okay and we can walk it back later depending on what  
7 happens in *House*. Like, we don't agree with that.

8           I mean, I guess, if the question is if there is not a  
9 *House* settlement in its current form, what's our position on  
10 *Hubbard*? We don't agree.

11           **THE COURT:** So, you don't -- going back to his first  
12 point, which was why not just settle it but not pay any money  
13 and you can withdraw if *House* doesn't go through, you don't  
14 want to do that.

15           **MR. KILARU:** No, we don't want preliminary approval  
16 and sort of a notice process going forward if we don't have a  
17 settlement on all the issues that we have negotiated and went  
18 through negotiations.

19           **THE COURT:** Okay. It's not obvious that that would be  
20 what someone in your position would want; but if that's what  
21 you want, you can ask for it or hold out for it.

22           **MR. KILARU:** I mean, we have to talk amongst our  
23 clients; but going back to the earlier issue, it is a central  
24 issue for us; and I think the Plaintiffs know that because we  
25 discussed it at length.

1 I think representing their class, they agreed to it. So,  
2 I don't think -- really understand why in this hearing we are  
3 hearing that actually changes to that are appropriate. That's  
4 part of the bargain that they struck, and they submitted for  
5 preliminary approval.

6 **THE COURT:** Oh, it was I who suggested it. You are  
7 talking about settling them separately.

8 **MR. KILARU:** I was confusing the issues, Your Honor.  
9 I was talking about the issue that came up in *House* related to  
10 the third party boosters and saying how that issue --

11 **THE COURT:** Oh, okay, well, that's different; but the  
12 idea of settling them -- of preliminarily approving the  
13 settlements and doing the notices separately is something I  
14 raised, not something that they raised. So don't blame.

15 **MR. KILARU:** I wasn't suggesting that specific piece  
16 of it; but to the extent there was a suggestion that that's  
17 what we agreed to, I don't agree to that.

18 **THE COURT:** No. Okay. All right.

19 **MR. KESSLER:** Your Honor, the question about  
20 Dr. Rascher, it's 227-5 in your ECF number -- 227-5 -- filed on  
21 July 26th, 2024. That Rascher declaration discusses his -- the  
22 *Hubbard* damages -- it discusses many things, but it discusses  
23 the *Hubbard* damages regarding that.

24 **THE COURT:** Okay. All right. Well, what I want to --  
25 I'm not prepared to make a ruling today, as you can probably

1 tell, whether to preliminarily approve the settlement.

2 I have -- I want to move forward on the notices and  
3 claims. I think it seems to me likely enough that there will  
4 be a settlement even if there is some changes to what's been  
5 agreed to so far; but it's worth working on the notices and  
6 claims.

7 If you want to take a shot on it based on what I said,  
8 that would be fine. We did one, and I can send it to you for  
9 what it's worth if you want to take a look at it.

10 And then on the other things, there are a few things I  
11 might have asked you to talk to each other about a little more,  
12 and maybe you will consider making some changes that would make  
13 more likely that the settlement could be preliminarily approved  
14 and perhaps more likely that it would hold up in future forums,  
15 which is always something that you need to think about.

16 And if you are able to make some changes along the lines  
17 of what we talked about, you could perhaps submit a new and  
18 different motion -- a new and different motion for preliminary  
19 approval or just come back and brief it and say, "Here is what  
20 we can agree to; what about this" or you can come back and say,  
21 "Forget it. We now see that it is a bad idea. We are just  
22 going to try the case. Give us a trial date" or whatever.

23 So, you can get started on the notice and claims, and you  
24 can get started talking to each other about some of these other  
25 ideas and maybe you want to book a session with Professor Green

1 to talk with him about some of them. Maybe you want to include  
2 Mr. Broshuis and Mr. Molo in a discussion and -- or at least  
3 consider what they had to say.

4 **MR. KILARU:** Your Honor, just so I can understand,  
5 when you say "work on the notice," I mean, I think we have a  
6 lot of -- based on your comments today, we have to talk about  
7 whether we have a deal; and we have to talk about the  
8 Plaintiffs. We have to talk amongst each other.

9 We can work on what notice documents would look like to  
10 address your concerns earlier. We can work on what orders  
11 would look like based on your very initial comments about  
12 forum.

13 But I don't know what it would mean to start providing  
14 notice if we don't have a settlement yet. So, if that's what  
15 you meant in terms of the form, we can do that.

16 **THE COURT:** No, no, no. I didn't mean to say -- maybe  
17 I wasn't clear. I didn't mean to send out the notice.

18 **MR. KILARU:** Okay.

19 **THE COURT:** To draft a notice that resolved some of my  
20 problems with the clarity of the current version. One might  
21 argue that that's a waste of time because you are not going to  
22 settle anyway and we won't need any notices; but I'm suggesting  
23 that in your spare time you could try and edit those notices so  
24 that we will have them if we are able to come up with a  
25 settlement.

1           **MR. KESSLER:** So, Your Honor, if I can just make sure  
2 we are all on the same understanding of where we are; okay.

3           Your Honor, raised a few different points. One point you  
4 raised about making the release clarifications part of the  
5 settlement agreement where the parties are in agreement, I  
6 think we can go do that. I don't think there is going to be  
7 any dispute. We will be able to work that out and amend the  
8 settlement agreement for that. That's not going to be an  
9 obstacle, at least as I understand what you want and what our  
10 agreement is with the other side.

11           **THE COURT:** Sure.

12           **MR. KESSLER:** The second area where you asked us to go  
13 back -- and I think there is only one other but you will tell  
14 me if I'm missing something -- the second area is this booster  
15 NIL language. And that's one where -- you know, where my  
16 colleague, Mr. Kilaru was saying he doesn't know if they are  
17 willing to change or not.

18           So we have to sit down with them and that either we will  
19 come back to you and say, "Yes, we have come up with some  
20 changes that -- and now we would like you to approve it that  
21 way." Or if we can't reach an agreement with them, then we  
22 will tell you that we couldn't reach an agreement; and you  
23 either approve or disapprove.

24           And what I was going to suggest -- and I think those are  
25 the only two areas. If you think there is something else,

1 Your Honor --

2 **THE COURT:** There is the future injunction. There is  
3 the two-sided problem of a class rep and an unconflicted  
4 attorney to represent the class of future athletes in the  
5 injunctive relief class and whether a -- whether a ten-year  
6 class of people who are not ascertained and can't be  
7 represented and can't be given notice -- I mean, we have talked  
8 about possible solutions to that, and I will have to look into  
9 that -- but that's one that I was quite concerned about.

10 **MR. KESSLER:** Well, you are correct you wanted us to  
11 be clear on the class reps, which I know we have to satisfy you  
12 on that, but is there some -- I just didn't -- I know we  
13 discussed the issue but I --

14 **THE COURT:** Well, there is a potential conflict of  
15 attorneys representing both damage -- present damage class  
16 members and future injunctive relief class members a la *Amchem*,  
17 *Ortiz*, *Payment Card* and *Literary*.

18 Some have argued that there is a sort of inherent conflict  
19 between the same attorneys representing both those types of  
20 classes. You have got responses to them and I have heard them,  
21 and I will think about it some more but I think that's an  
22 issue.

23 **MR. KILARU:** Your Honor, can I suggest something,  
24 which is -- because I actually think there is work we need to  
25 do, and I don't actually agree with Mr. Kessler that it's

1 necessarily a binary whether we have changes or we don't.

2 Can I suggest we confer with the Plaintiffs and come up  
3 with a date on which to make a supplemental submission to you?  
4 And that will contain our position on these issues; whether  
5 there need to be changes on the booster piece, why there  
6 shouldn't be a concern about the forwards/backwards, assuming  
7 we can resolve the first, and amendments to the notices as  
8 appropriate based on your comments.

9 And, you know, if we can -- we will submit to you what our  
10 best effort is on that, and then at that point we think that  
11 will be helpful as opposed to trying to do this kind of  
12 onesie-twosie in a way that doesn't really follow.

13 **THE COURT:** I'm not sure what the difference is  
14 between what you just said and what we were talking about, but  
15 what you just said sounds fine to me.

16 (Pause in proceedings.)

17 **THE COURT:** You could also negotiate. I mean, there  
18 are certain -- I guess, what you are talking about is a  
19 negotiation, but you don't necessarily have to reach an  
20 agreement on the third party NIL issue if you can offset that  
21 with something else. But then, of course, you get into the  
22 whole conflict problem. But as long as you stick, perhaps,  
23 with damages and don't mix in injunctive relief, you will be  
24 okay.

25 **MR. KESSLER:** Your Honor, the only thing I would --

1 and I understand, I think, your direction. I think it would be  
2 helpful, at least from our standpoint, to set, like, a deadline  
3 by which we get back to you because, frankly, from the  
4 Plaintiffs' standpoint, if we are going to solve these issues  
5 and go forward, that's great.

6 And if not, then we want a trial date. If we are not  
7 getting a deal, we don't want to push this off, you know, very  
8 long. So, I would say give us, like, three weeks or set a date  
9 by which the parties come back to and either say, "Here is some  
10 changes we have agreed to; here are proposals" and submit new  
11 papers or we come back and say, "We can't agree to anything  
12 other than what we have agreed to." And if Your Honor rejects  
13 it, then we will need a trial date. So, I think we should have  
14 a schedule.

15 **THE COURT:** Okay. Well, I was going to say a week to  
16 come up with the easy things, like the changes to the notice,  
17 the changes to the release, the changes to the settlement  
18 agreement, everything that's just a matter of changing some  
19 words around, you could maybe do in a week or maybe two; and  
20 then another week or two after that to meet and confer and  
21 negotiate and try to see if you can reach an agreement or at  
22 least enough that you can feel confident that you will be able  
23 to reach an agreement that you are all willing to work on it  
24 some more and --

25 **MR. KILARU:** Your Honor --



1           **THE COURT:** -- you can get that done, let's say, in  
2 four weeks.

3           **MR. KILARU:** I think we can agree to three or four  
4 weeks on everything, but I don't really understand --  
5 respectfully, I don't understand the logic of making some  
6 changes to the settlement agreement while we are still talking  
7 about other changes to the settlement agreement, assuming we  
8 are even willing to make those changes. It seems to me much  
9 more efficient to do it all together.

10           **THE COURT:** Oh, sure. You don't have to also make the  
11 changes. You will just agree on what they are going to be.

12           What I'm picturing is an addendum to the settlement  
13 agreement which says, "Section X, Y and Z is amended to clarify  
14 that you aren't waiving your Choh claims and your Johnson  
15 claims."

16           And you won't file it. You won't get it signed. You  
17 won't do anything with it. You will just come up with the  
18 verbiage and agree that if you -- everything else is resolved,  
19 you will have that plug in, and we won't have to wait another  
20 week for that to happen.

21           **MR. KILARU:** And -- we can agree -- I suppose we could  
22 try to do that with the Plaintiffs, but what goes in the notice  
23 is pretty tied to what the settlement is.

24           **THE COURT:** Well, there's other stuff. You could have  
25 two options -- I don't know. If it doesn't work, it doesn't

1 work. I'm not wedded to it. And actually, it is really  
2 something more for Plaintiffs to worry about than you since it  
3 is their clients that they are communicating with.

4 **MR. KESSLER:** So, Your Honor, why don't we agree that  
5 we will report back to you on everything -- you know, three  
6 weeks, you know, on everything. And, you know, if we can do  
7 some earlier, we will do some earlier, if we can move that  
8 forward. Then we know by the end of three weeks, we will  
9 either have addressed these issues or not addressed them and we  
10 will let you know.

11 **THE COURT:** Okay. Is that all right with you,  
12 Mr. Kilaru?

13 **MR. KILARU:** Yes, Your Honor.

14 **THE COURT:** Okay. So, I have got permission from my  
15 court reporter and my law clerk and my clerk that I can go a  
16 little bit beyond 5:00 o'clock, which I don't like to do, but I  
17 want to go through my notes as quickly as I can and see if  
18 there's any pressing questions that I didn't get to that I want  
19 to ask you.

20 So, if you-all don't mind staying for a few more minutes.  
21 I was also hoping to give everybody a short closing statement,  
22 but I don't think we will have time for that; and it probably  
23 won't be that helpful anyway.

24 But if you don't mind, give me a couple minutes to look at  
25 my notes.

(Pause in proceedings.)

**THE COURT:** What would happen if we -- vis-a-vis the ten-year term for the injunction, which ends up being an injunctive relief class, that necessarily then ends in ten years -- I don't know, maybe Defendant doesn't mind that. I guess it's -- maybe it's just the objectors who mind that.

But what that made me question was: Do you need to have a ten-year class period in order to have a ten-year injunctive relief period?

Maybe we just say the class has ended but the obligation to obey the Court's orders carries on for ten years, and class counsel are charged with monitoring and making sure that it isn't changed.

**MR. KILARU:** Your Honor, I don't think that works. To Mr. Kessler's point earlier, you need to have an injunction that's binding on folks with the right to object as they see fit for this to work.

It doesn't work to say there is a class of defined people that are bound by this injunction, and then anyone on day two can say actually it should be something different.

That's the reason it is a ten-year settlement, and there is appropriate objections for people in the objections process.

**THE COURT:** Okay.

**MR. KILARU:** I would just note, for example, Your Honor, you have entered injunctions in the past that had a

1 finite date; and it didn't stop another lawsuit from being  
2 filed the date after that. So, I think that's the concern we  
3 have with not having the ten-year period.

4 **MR. KESSLER:** Can I just note, Your Honor, that the  
5 injunctive class doesn't give up any damages claims. So if  
6 anyone thinks during that period there is some violation of the  
7 antitrust laws or otherwise -- including by what's being done  
8 under the settlement -- they are not bound in any way, shape or  
9 form. They simply can't seek an injunction under the antitrust  
10 laws to change the settlement terms. That's the only  
11 consequence in -- of that ongoing class membership.

12 (Pause in proceedings.)

13 **THE COURT:** Well, this is a really minor one, but  
14 I guess I will say it as long as we have a little more time.

15 There is a question about whether NCAA rules are attacked  
16 and also whether conference rules are attacked, and the second  
17 amended complaint says the conference rules are attacked to the  
18 extent that they incorporate objectionable NCAA rules.

19 In the release -- in the agreement, it says that it  
20 objects to NCAA rules and conference rules and doesn't say  
21 conference rules that incorporate NCAA rules.

22 So, it's potentially broader and potentially attacking  
23 other rules that weren't mentioned in the second amended  
24 complaint.

25 I don't know if this is a big deal or not. I don't know

1 if it is meaningful or not. I don't know if anybody even knows  
2 what I'm talking about, but does anyone have any thoughts on  
3 that?

4 **MR. KESSLER:** The only thing I would note, Your Honor,  
5 is the release is just for NCAA conference rules that limit  
6 compensation and benefits, you know -- in other words, it is  
7 the same subject matter area or which it is almost the same.  
8 We can go look at that. It is not a release of conference  
9 rules in general that might relate to other subjects.

10 **THE COURT:** Okay. Why don't you take a look at that  
11 language if you can find it and see if it needs to be tightened  
12 up at all.

13 **MR. KESSLER:** Okay.

14 (Pause in proceedings.)

15 **THE COURT:** Oh, there was an inconsistency in the  
16 *Hubbard* damage calculations between the description of what  
17 they would be in the motion versus Dr. Rascher's description.

18 The description in the motions talked about relative  
19 amounts, and Rascher's report talked about pro rata amounts.

20 I'm assuming if there is some difference, you are going  
21 with Rascher and not with what's in the motion. Can I assume  
22 that?

23 **MR. KESSLER:** Rascher is the way we are going to  
24 allocate. I don't think there is any substantive difference.  
25 I think Rascher uses a different word but it's the same thing.

1           **THE COURT:** Okay. Well, I think I have more  
2 questions, but I don't think that it's a good time to try to  
3 look for them now.

4           If I come up with something that I really want to know  
5 about, I might ask you, let's say, for a further memo on a  
6 certain point and have each of you give me a page or a letter  
7 brief on something that I have a problem with.

8           Otherwise, I guess you have agreed to get back to me in  
9 three weeks with a prognosis about all of the things that we  
10 have talked about today and then we will take it from there.

11           **MR. KESSLER:** Yes.

12           **THE COURT:** Maybe you will give me a letter brief or a  
13 stipulation or something to tell me what's going on.

14           **MR. KILARU:** We will work out some kind of joint  
15 submission, Your Honor. I'm not sure we will agree on  
16 everything, but we will file something that makes sense.

17           **MR. KESSLER:** (Inaudible), Your Honor.

18           **THE COURT:** And the harder stuff later, you could do  
19 that; okay. Anything else burning from anybody?

20                               (No response.)

21           **THE COURT:** Okay. Thank you everyone and thank you to  
22 my staff for staying over. And if I need a hearing after I get  
23 your report, I will set one. If I don't, I will just try to  
24 rule on it. Okay.

25           **MR. KESSLER:** Thank you.

1           **MR. BERMAN:** Thank you, Your Honor.

2           **MR. BROSHUIS:** Thank you.

3           **THE CLERK:** Court is in recess.

4                   (Proceedings adjourned at 5:08 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: September 6, 2024



Marla F. Knox, CSR No. 14421, RPR, CRR, RMR  
United States District Court - Official Reporter